(1)
No. 95-928-CFX   Title: John W. Atherton, Jr., Petitioner
v.
Federal Deposit Insurance Corporation, as Receiver for City Savings, F.S.B.

Docketed:
December 13, 1995   Court: United States Court of Appeals for the Third Circuit

Entry	Date	Proceedings and Orders
	Dec 12 1995	Petition for writ of certiorari filed. (Response due March 6, 1996)
	Jan 5 1996	Order extending time to file response to petition until February 12, 1996.
	Feb 7 1996	Order further extending time to file response to petition until March 6, 1996.
	Mar 6 1996	Brief amici curiae of American Bankers Association, et al. filed.
	Mar 6 1996	Brief of respondent Federal Deposit Insurance Corporation in opposition filed.
	Mar 14 1996	Reply brief of petitioners filed.
	Mar 20 1996	DISTRIBUTED. April 12, 1996
	Mar 20 1996	Petition as to Marshall M. Criser, Alfred J. Hedden, and Gilbert G. Roessner dismissed pursuant to Rule 46.
	Apr 15 1996	Petition GRANTED. SET FOR ARGUMENT November 4, 1996. ***
	Apr 30 1996	Writ of certiorari as to Gordon E. Allen and Peter R. Kellogg dismissed pursuant to Rule 46.1.
	May 3 1996	Order extending time to file brief of petitioner on the merits until June 27, 1996.
	Jun 26 1996	Motion of petitioner to dispense with printing the joint appendix filed.
	Jun 27 1996	Brief amici curiae of Joseph Iaria, et al. filed.
	Jun 27 1996	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Jun 27 1996	Brief amici curiae of American Bankers Association, et al. filed.
	Jun 27 1996	Brief of petitioner John W. Atherton, Jr. filed.
	Jul 31 1996	Brief of respondent Federal Deposit Insurance Corporation filed.
	Aug 15 1996	Record filed.
	Aug 20 1996	Record filed.
	Aug 30 1996	Reply brief of petitioner John W. Atherton, Jr. filed.
	Sep 5 1996	Motion of petitioner to dispense with printing the joint appendix GRANTED.
	Sep 13 1996	CIRCULATED.
	Nov 4 1996	ARGUED.

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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN W. ATHERTON, JR., GORDON E. ALLEN, ALFRED J. HEDDEN, PETER R. KELLOGG, GILBERT G. ROESSNER, and MARSHALL M. CRISER,

Petitioners,

vs.

RESOLUTION TRUST CORPORATION, in its capacity as receiver for CITY SAVINGS, F.S.B.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Section 212(k) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(k) ("Section 1821(k)"), explicitly provides that an officer or director of an "insured depository institution" -- defined elsewhere in FIRREA as "*any* bank or savings association" (emphasis added), whether federally or state chartered, the deposits of which are insured by the Federal Deposit Insurance Corporation (the "FDIC") -- may be held personally liable for "gross negligence," or any similar or greater breach of a duty of care, as such terms are defined under state law. The questions presented for review are:

1. Whether Section 1821(k) supplants "federal common law" and constitutes the exclusive standard of liability in a civil damage action brought by the Resolution Trust Corporation (the "RTC") against the former officers and directors of a failed federally chartered FDIC insured savings bank. (As explained herein, literally dozens of such actions are presently pending throughout the United States, and many more may be brought in the future.)

2. Whether the court of appeals erred in concluding that Section 1821(k) -- a *federal* statute expressly made applicable to actions against officers or directors of "*any*" FDIC insured bank or savings association, without regard to where it is chartered -- has *no* application whatsoever to RTC actions against officers and directors of failed *federally* chartered FDIC insured institutions, and that the liability of officers and directors of such institutions is instead governed exclusively by "federal common law."

As shown below, the decision of the court of appeals is in irreconcilable conflict with (i) the plain language of Section 1821(k), (ii) the conclusion of each of the other four circuit courts of appeals that have addressed this same question, and (iii) this Court's well-established prior rulings concerning the creation and application of "federal common law," including especially this Court's recent decision in *O'Melveny & Myers v. FDIC*, ___ U.S. ___, 114 S.Ct. 2048 (1994), which

explicitly cites Section 1821(k) as one of several "provisions of FIRREA which *specifically create special federal rules of decision* . . ." and thus supplant federal common law. 114 S.Ct. at 2054 (emphasis added).

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were petitioners John W. Atherton, Jr., Gordon E. Allen, Alfred J. Hedden, Peter R. Kellogg, Gilbert G. Roessner, and Marshall M. Criser; respondent Resolution Trust Corporation in its capacity as receiver for City Savings, F.S.B.; CityFed Financial Corp., the parent holding company of City Federal Savings Bank, a predecessor of City Savings, F.S.B.; Victor A. Pelson and John Kean, Jr., defendants-appellees below who have since entered into settlement agreements with respondent Resolution Trust Corporation and have been (or, in the case of Mr. Kean, is expected soon to be) dismissed from this action; and George E. Mikula, James P. McTernan, Richard E. Simmons and K. Michael DeFreytas, defendants-appellees below who continue to be parties to this action.

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No. 95-

IN THE

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JOHN W. ATHERTON, JR., GORDON E. ALLEN, ALFRED J. HEDDEN, PETER R. KELLOGG, GILBERT G. ROESSNER, and MARSHALL M. CRISER,

Petitioners,

vs.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners John W. Atherton, Jr., Gordon E. Allen, Alfred J. Hedden, Peter R. Kellogg, Gilbert G. Roessner, and Marshall M. Criser respectfully request that a writ of certiorari issue to review the judgment of a divided panel of the United States Court of Appeals for the Third Circuit in this action issued on June 23, 1995, and that such judgment be summarily reversed.

OPINION BELOW

Review is sought of a decision of a divided panel of the United States Court of Appeals for the Third Circuit (Mansmann, J., dissenting in relevant part), issued on June 23, 1995. The opinion is reported under the caption *Resolution Trust Corporation v. CityFed Financial Corporation*, 57 F.3d 1231 (3d Cir. 1995). Copies of the opinion, judgment and order denying rehearing *en banc* are attached as an Appendix to this petition.

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit was filed on June 23, 1995. Petitioners timely filed a petition for rehearing with request for rehearing *en banc*, which was denied on September 14, 1995. The judgment of the court of appeals was issued on September 22, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves section 212(k) of FIRREA, 12 U.S.C. § 1821(k), referred to herein as "Section 1821(k)". That section provides:

> Liability of directors and officers.
>
> A director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by, on behalf of, or at the request or direction of the [Federal Deposit Insurance] Corporation,[1] which action is prosecuted wholly or partially for the benefit of the Corporation--

[1] Pursuant to section 212(d) of FIRREA, 12 U.S.C. § 1821(d), the RTC in its capacity as receiver is given the same enforcement powers as the FDIC, including the power to bring civil damage actions pursuant to Section 1821(k).

> (1) acting as conservator or receiver of such institution,
>
> (2) acting based upon a suit, claim. or cause of action purchased from, assigned by, or otherwise conveyed by such receiver or conservator, or
>
> (3) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed in whole or in part by an insured depository institution or its affiliate in connection with assistance provided under section 13,
>
> for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.

STATEMENT OF THE CASE

This case involves a claim for civil money damages brought by the RTC against former officers and directors of City Federal Savings Bank ("City Federal"), a federally chartered, federally insured savings bank that was located in Bedminster, New Jersey, prior to its seizure in December 1989. At that time, the Office of Thrift Supervision declared City Federal insolvent, ordered it closed and appointed the RTC as City Federal's receiver.

The RTC, in its capacity as receiver[2], instituted the current action against former City Federal officers and directors in

[2] Through a series of transfers effectuated by the Office of Thrift Supervision, City Federal's assets, including its claims in this action, were ultimately transferred to the newly created entity named in the caption of this *(Footnote continued)*

1993. The RTC alleges that the former officers and directors are liable for breaching their duty of care in connection with losses suffered by City Federal on three real estate acquisition, development and construction loans made by the institution in the mid-1980s. The loans defaulted in 1988 and 1989, during the nationwide collapse of the commercial real estate market.

Significantly, the RTC does not assert that any of the defendants engaged in any fraud, self dealing, conflict of interest, unjust enrichment or other breach of their duty of loyalty. Rather, the RTC claims only that the defendants failed to properly discharge their duty of care as officers and directors of City Federal in connection with their consideration, approval and oversight of the three loans that are the subject of this action.

In its original complaint, filed in April 1993, and its first amended complaint filed two months later, the RTC alleged, in a single count, claims for negligence, gross negligence and breach of fiduciary duty under both state and federal common law. Neither pleading asserted any claim against the former officers and directors predicated on the statutory standard of liability contained in Section 1821(k).

Petitioners, defendants below, moved to dismiss the RTC's first amended complaint, contending that Section 1821(k) established gross negligence as the exclusive standard of care in suits against officers and directors of federally chartered financial institutions. The RTC conceded (and the district court held) that state law was not applicable in this case, since City Federal was a federally chartered institution. The RTC argued, however, that despite the clear gross negligence standard set forth in the text of Section 1821(k), the "savings clause" contained in the last sentence of the statute preserved its right to proceed against the officers and directors under

case, City Savings, F.S.B., for which the RTC was also appointed receiver and on behalf of which it purports to bring this action.

"federal common law," which it has asserted establishes an "ordinary" or "simple" negligence standard of liability.

On November 15, 1993, the district court granted the Petitioners' motion and dismissed the RTC's complaint to the extent it alleged claims based other than upon Section 1821(k). (A-58 *et seq.*[3]) The district court held that Section 1821(k) established a uniform federal gross negligence standard of care in cases involving federally chartered institutions and supplanted any claims under federal common law. (A-62-64)

The RTC then filed a second amended complaint, which asserted claims against the former officers and directors based solely on Section 1821(k). The RTC also moved to certify the standard of care issue for immediate appeal to the United States Court of Appeals for the Third Circuit, pursuant to 28 U.S.C. § 1292(b). The district court granted the RTC's motion (A-65) and, on May 18, 1994, the court of appeals granted the RTC's request for permission to appeal (A-68).

On June 23, 1995, a divided panel of the court of appeals reversed the district court. *Resolution Trust Corp. v. CityFed Fin. Corp.*, 57 F.3d 1231 (3d Cir. 1995), A-1 *et seq.* The majority stated:

> We hold that Congress [in enacting Section 1821(k)] did not . . . supplant federal common law holding directors and officers liable for conduct less culpable than gross negligence. Accordingly, . . . we will reverse the district court's order and direct the court to permit the RTC to pursue any claims for negligence or breach of fiduciary duty available as a matter of federal common law.

57 F.3d at 1249, A-37. But the majority went even further, stating:

[3] The citation "A-__" refers to pages of the Appendix annexed hereto.

> Given our conclusion that Congress did not intend § 1821(k) to apply to federally-chartered depository institutions, the RTC *cannot* proceed under § 1821(k) in the City Federal action.

Id. at 1249 n.17, A-37 (emphasis in original).

The majority concluded that, notwithstanding the plain language of Section 1821(k), which clearly makes the statute applicable to actions against former officers and directors of federally chartered institutions such as City Federal, Congress had intended, when it adopted the statute, to do no more than preempt certain so-called "insulating" statutes that had been enacted by various states in recent years and which established a higher standard of care than gross negligence for officers and directors of companies incorporated in those states. Accordingly, the Third Circuit held that Section 1821(k) had no application whatsoever to federally chartered institutions, leaving a void which, the court held, was to be filled exclusively by "federal common law."

In a forceful dissent, Circuit Judge Mansmann argued that the majority's conclusion conflicted with the plain language of Section 1821(k), which, by its clear terms, applies to *all* "insured depository institutions," a term defined to include *any* institution, whether federally or state chartered, insured by the FDIC. 57 F.3d at 1251, A-40 (citing 18 U.S.C. § 1813(c)(2)). Judge Mansmann concluded that Section 1821(k) did indeed supplant federal common law, emphasizing that her analysis was guided by what she termed the "vastly different tests" that this Court has established for deciding whether a federal statute supplants federal common law, on the one hand, or preempts state law, on the other. *Id.* at 1249-50, A-38-39.

Citing this Court's decision in *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), Judge Mansmann stated that, when the question is whether federal statutory or federal common law governs, it is for Congress, and not the courts, to articulate the applicable standard, with federal common law to be developed and used only as a "necessary expedient" in the absence

of a federal statute. 57 F.3d. at 1250, A-39 (citing *City of Milwaukee*, 451 U.S. at 313-17). Because she concluded that Congress, when it enacted Section 1821(k), "spoke directly" to the issue of the standard of liability applicable in cases such as this (57 F.3d at 1252, A-44), she stated that she would have held, as the Fifth, Sixth, Seventh and Tenth Circuits had previously held, that Section 1821(k) supplanted federal common law and provided the exclusive source of law in this case.

In arriving at her conclusion, Judge Mansmann strongly disputed the majority's assertion that the purpose of Section 1821(k) was solely to preempt the so-called state insulating statutes. She noted that the statute's legislative history makes clear that Congress also "understood the importance of attracting qualified persons to serve as officers and directors of financial institutions," and that Congress intended, in selecting gross negligence as the applicable standard under Section 1821(k), to choose a threshold of liability that was not so low as to discourage such qualified individuals from doing so. 57 F.3d at 1253, A-45. She pointed out that the Senate's initial draft of Section 1821(k) would have permitted the RTC to bring claims "for any cause of action available at common law, including but not limited to negligence, gross negligence, willful misconduct. . .," but that the amended version of the bill "removed, *inter alia*, all references to a simple negligence standard." 57 F.3d at 1253, A-45-46. In addition, she noted that, after Section 1821(k)'s enactment, there were two unsuccessful attempts to amend the statute to include a simple negligence standard of liability. 57 F.3d at 1254, A-48-49. These and other factors led Judge Mansmann to conclude that Congress had indeed intended to supplant federal common law and to set gross negligence as the governing standard in Section 1821(k).

Following the court of appeals's decision, Petitioners sought rehearing, with a suggestion of rehearing *en banc*. This request was supported by an *amicus curiae* brief filed by the American Bankers Association, America's Community Banks, the Association of Bank Holding Companies and the Independent Bankers Association of America, which emphaized,

among other things, the adverse impact that the majority's decision would have on the ability of their member institutions to attract the best qualified managers. The court of appeals denied the petition for rehearing on September 14, 1995. (A-54-56)

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this action for four reasons:

First, the Third Circuit's decision flies in the face of the plain language of Section 1821(k) and violates well-established rules of statutory construction. Section 1821(k) is a federal statute that, by its very terms, applies to *all* "insured depository institutions," a term defined in FIRREA to include federally chartered institutions such as City Federal. To hold, as the court of appeals did, that Section 1821(k) has *no* application whatsoever to federally chartered institutions constitutes a wholly inappropriate act of judicial lawmaking that frustrates the design of Congress in enacting that statute. (*See* Point I, *infra*)

Second, as noted by the dissenting judge below, the majority's conclusion that "federal common law," instead of Section 1821(k), supplies the applicable law in this case violates this Court's longstanding rules respecting the creation and application of such judge-made law set forth in *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), and reiterated only recently in *O'Melveny & Myers v. FDIC*, __ U.S. __, 114 S. Ct. 2048 (1994). Those decisions make clear that "'[t]here is no federal general common law,'" (*O'Melveny & Myers*, 114 S.Ct. at 2053, quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)); that federal common law exists solely as a "necessary expedient" to be resorted to only in "a 'few and restricted' instances" in the absence of a federal statute; and that when Congress has "spoken" to an issue -- as it plainly has in Section 1821(k) -- Congress's statutory enactment prevails and supplants any judge-made federal common law (*City of Milwaukee*, 451 U.S. at 313-15). Indeed, in *O'Melveny & Myers*, this Court severely restricted the creation and use of

federal common law in cases instituted by the RTC and FDIC, and explicitly identified Section 1821(k) as one of a number of provisions in FIRREA "which specifically create special federal rules of decision" and thus leave no room for the operation of federal common law. 114 S.Ct. at 2054. Nevertheless, the Third Circuit simply ignored the teaching of *O'Melveny & Myers* in reaching its decision below. (*See* Point II, *infra*)

Third, the decision below is in irreconcilable conflict with the decisions of the Fifth, Sixth, Seventh and Tenth Circuits, each of which has concluded -- consistent with *City of Milwaukee* and *O'Melveny & Myers* -- that Section 1821(k) supplants federal common law and establishes gross negligence as the exclusive standard of liability in RTC and FDIC actions against former officers and directors of federally chartered depository institutions. *See Resolution Trust Corp. v. Miramon*, 22 F.3d 1357 (5th Cir. 1994); *FDIC v. Bates*, 42 F.3d 369 (6th Cir. 1994); *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416 (7th Cir. 1993); *Resolution Trust Corp. v. Frates*, 52 F.3d 295 (10th Cir. 1995). (*See* Point III, *infra*)

Finally, this case presents an issue of immense importance, which will have a direct impact on a large proportion of the more than one hundred presently pending actions brought by the RTC against officers and directors of failed financial institutions. *See* Resolution Trust Corp., Division of Legal Services, Professional Liability Section, *Semiannual Report, April 1, 1995 Through September 30, 1995*, (1995). These actions will continue to be prosecuted by the FDIC, which will assume the RTC's responsibilities and caseload when the latter agency ceases to exist at the end of 1995. *Id.* at 2. In addition, the decision in this case will dramatically affect any current and future litigation brought against officers and directors by the FDIC. It is no exaggeration to say that the resolution of the standard of care issue raised in this case is being watched closely by experienced and thoughtful businesspersons throughout the United States, as well as by our nation's financial institutions, since its outcome will affect both the willingness of the former to serve as officers and directors of

such enterprises, and the ability of the latter to attract competent management -- a key concern of Congress when it enacted Section 1821(k). *See, e.g.*, 135 Cong. Rec. S4276-77 (daily ed. April 19, 1989); *Gallagher*, 10 F.3d at 422; *CityFed*, 57 F.3d at 1253, A-45 (Mansmann, J., dissenting). Indeed, this issue is so significant, and the Third Circuit's decision below is so clearly at odds with settled law, that Petitioners submit that this Court should not only grant the requested writ of certiorari, but should summarily reverse the decision below pursuant to this Court's Rule 16.1. *(See* Point IV, *infra)*

I

THE THIRD CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE PLAIN LANGUAGE OF SECTION 1821(k) AND VIOLATES WELL-ESTABLISHED RULES OF STATUTORY CONSTRUCTION

The Third Circuit held that Section 1821(k) -- a *federal* statute that governs the liability of officers and directors of all *federally* insured depository institutions -- applies only to *state* chartered institutions, and has *no* applicability whatsoever to *federally* chartered institutions, even though the plain language of Section 1821(k) makes no such distinction. This is not an insignificant error in statutory construction; it eviscerates Section 1821(k), frustrates Congress's design and has broad implications for the interpretation of other sections of FIRREA.

Section 1821(k) provides that "[a] director or officer of an *insured depository institution* may be held personally liable for money damages in any civil action by [the RTC] . . . for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care. . . ." (Emphasis added) As pointed out in the dissent below (57 F.3d at 1250, A-39-40), the term "insured depository institution" is defined in FIRREA as "*any* bank or savings association the deposits of which are insured by the [FDIC]. . . ." 12 U.S.C. § 1813(c)(2) (emphasis added). No distinction whatsoever is made between state chartered and federally chartered institutions.

Significantly, the subsections immediately following the definition of an "insured depository institution" contain separate definitions for "federal depository institution" and "state depository institution." 12 U.S.C. §§ 1813(c)(4) and (c)(5) provide:

> (4) Federal depository institution. The term "Federal depository institution" means any national bank, any Federal savings association, and any Federal branch.
>
> (5) State depository institution. The term "State depository institution" means any State bank, any State savings association, and any insured branch which is not a Federal branch.

12 U.S.C. §§ 1813(c)(4) and (c)(5). Clearly, if Congress had intended Section 1821(k) to apply only to state chartered institutions, as the majority below concluded, Congress could have simply used the term "State depository institution" in Section 1821(k) instead of "insured depository institution," a term that makes no distinction between the chartering authorities.

Congress did not do so, opting instead for the broader, more inclusive term "insured depository institution." Yet, despite the plain language of Section 1821(k), the court of appeals determined, based on its reading of the statute's legislative history, that it applied only to state chartered institutions. In so holding, the court of appeals quite literally read Section 1821(k) out of the United States Code, at least insofar as thousands of federally chartered institutions are concerned.

Moreover, as explained in the dissent below (57 F.3d 1249-50, A-38-39) and as shown in Point II, *infra*, the court of appeals compounded this error by determining that "federal common law," and not Section 1821(k), supplied the standard of liability for officers and directors of federally chartered institutions. In so holding, the majority below violated well-settled principles relating to the use of such judge-made law.

In *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), this Court made clear that "[t]here is no federal general common law." Later, in *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981), the Court explained that federal common law is simply a "'necessary expedient'" that should be resorted to only in "a 'few and restricted' instances" in the absence of a federal statute. Such judge-made law, this Court held, is "'subject to the paramount authority of Congress.'" *Id.* at 313 (citations omitted). Thus, when Congress "speak[s] directly" to a question -- as it has plainly done in this case -- federal common law is supplanted by Congress's enactment; it is not necessary for Congress to "affirmatively proscribe" the federal common law [illegible] in order to abrogate its application. *Id.* at 315.

The Third Circuit majority committed such manifest error in this case because, from the outset, it adopted a fundamentally flawed approach to statutory construction. Faced with the identical task of interpreting the meaning of Section 1821(k), the courts of appeals for the Fifth, Sixth, and Seventh Circuits began their analyses by examining the actual statutory language contained in that provision. *RTC v. Miramon*, 22 F.3d 1357, 1360-61 (5th Cir. 1994); *FDIC v. Bates*, 42 F.3d 369, 371 (6th Cir. 1994); *RTC v. Gallagher*, 10 F.3d 416, 419-420 (7th Cir. 1993). This is the accepted approach to statutory construction, and the only mode of analysis consistent with prior decisions of this Court. The interpretation of a statute must begin with its literal language, and not with its legislative history. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990).

While paying lip service to this accepted practice (57 F.3d at 1237, A-13), the majority below did not follow it and thereby did violence to the statute. Rather than examining the plain language of Section 1821(k) in its entirety, the majority turned immediately to, and focused exclusively on, the "savings clause" contained in the very last sentence of the statute. *Id.* No consideration was given at all to the more extensive substantive portion of the law preceding the savings clause. This substantive language is broad and inclusive; it not only articulates the

gross negligence standard, but makes clear that it applies to "any" civil action by the FDIC or RTC, regardless of the capacity in which they are proceeding or the manner in which they obtained the claim being pursued. There is not the slightest indication in this language that Congress sought to create or single out for separate treatment a special category of claims against officers and directors of *federally* chartered institutions.

However, ignoring Section 1821(k)'s plain language, the majority simply announced its agreement with the RTC's broad, statute-swallowing interpretation of the savings clause as manifesting Congressional "intent" to preserve federal common law in such cases. 57 F.3d at 1237, A-13. In so holding, the majority violated the well-established rule of statutory construction that a savings clause cannot be allowed to supersede a specific substantive provision. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992); *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

The majority further asserted that Congress could not possibly have "intended" any other meaning for the savings clause. 57 F.3d at 1238, A-14. This preoccupation with Congress's "intent," instead of the literal language of the statute, was clear error. In effect, the majority first read the legislative history to determine what it believed Congress "must" have meant, and then tortured the language of the statute to fit within that construction. In the process, the majority read the gross negligence standard out of the statute with respect to federally chartered institutions, even though Congress gave no hint whatsoever that it sought to achieve such a strange result.

A court may be entitled to depart from the literal language of a statute on rare occasions when confronted with unambiguous legislative history to the contrary. *Kaiser Aluminum & Chem. Corp.*, 494 U.S. at 835. However, the legislative history does not justify that extraordinary practice in this case. Indeed, each of the other courts of appeals to have considered this issue (and the dissenting judge below) concluded that the legislative history clearly supported a very different view of the purpose of Section 1821(k) from the one adopted by the

Third Circuit. *Bates*, 42 F.3d at 372-73; *Miramon*, 22 F.3d at 1362-63; *Gallagher*, 10 F.3d 421-22; *CityFed*, 57 F.3d at 1252-53, A-44-49 (Mansmann, J., dissenting).

The court of appeals, in the decision below, assumes that Congress in enacting Section 1821(k) was simply seeking to impose maximum liability on officers and directors of failed depository institutions -- "to place a floor, not a ceiling," on the liability of such individuals. 57 F.3d at 1238-39, A-15. From that assumption, it comes to the conclusion that Congress cannot have intended Section 1821(k) to mean what it says. However, even a cursory examination of the legislative history underlying Section 1821(k) shows that the Third Circuit misread Congress's purpose.

The legislative history of Section 1821(k) shows that Congress sought to balance *two* competing considerations. On the one hand, as the majority below notes, Congress sought to relieve the RTC and FDIC from the effects of certain so-called "insulating" statutes passed by various states that required proof of intentional violations of the duty of care in order to recover civil money damages from officers and directors of corporations incorporated in those states. At the same time, however, Congress also sought to achieve another objective -- it wished to avoid setting the liability threshold so low that well qualified and experienced businesspersons would be discouraged from serving as officers and directors of the thousands of depository institutions throughout the United States. *See Bates*, 42 F.3d at 372-73; *Miramon*, 22 F.3d at 1362-63; *Gallagher*, 10 F.3d 421-22; *CityFed*, 57 F.3d at 1252-53, A-45 (Mansmann, J., dissenting).

Congress, in its wisdom, decided that the proper balance between these two competing objectives was the gross negligence standard which appears in Section 1821(k). *Id.*[4] This

[4] Indeed, as noted in the dissent (57 F.3d at 1253, A-45-46), the original Senate version of Section 1821(k) would have permitted suits for simple negligence, but the bill was amended to delete this provision. Moreover, after FIRREA became law, two attempts were made to change Section

(Footnote continued)

decision was hardly surprising, since it struck the balance at exactly the same point as the leading state law jurisdiction, whose rulings have been followed in numerous other states as well. *See Aronson v. Lewis*, 473 A.2d 805, 812-13 (Del. 1984) (holding that, under the business judgment rule as applied in Delaware, the standard of liability for corporate officers and directors is effectively gross negligence); *Matter of Prudential Ins. Co. Derivative Litig.*, 282 N.J. Super. 256, 275, 659 A.2d 961, 970 (N.J. Ch. 1995)(following *Aronson*); *Katz v. Chevron Corp.*, 22 Cal. App. 4th 1352, 1367, 27 Cal. Rptr. 2d 681, 689 (1994)(same); *Brane v. Roth*, 590 N.E.2d 587, 591 (Ind. App. 1992)(same); *Yost v. Early*, 87 Md. App. 364, 377, 589 A.2d 1291, 1298 (Md. Ct. Spec. App. 1991) (same).

The Third Circuit, however, has decided that Congress's balancing of these two competing concerns was improper. It has, in effect, overruled Congress's decision and, by judicial legislation, has replaced that decision with a test of its own which it believes strikes a better balance between these two interests. This is manifestly improper as a matter of law; moreover, as a practical matter it will surely discourage qualified businesspersons from serving as officers and directors of depository institutions, which is exactly the result that Congress sought to avoid.

Furthermore, the decision below, if allowed to stand, may well have a far-reaching effect on the interpretation of other sections of FIRREA. Several sections of FIRREA, like Section 1821(k), are made broadly applicable to "insured depository institutions." Following the decision below, courts could limit the application of these sections only to state chartered institutions. For example, the section of FIRREA involving the applicable statute of limitations, 12 U.S.C. § 1821(d)(14), which is applicable to "insured depository institutions," may now be interpreted to apply only to state chartered institutions. The same is true of other sections of FIRREA. *See, e.g.*,

1821(k) to authorize suits for simple negligence, and both were unsuccessful. 57 F.3d at 1253, A-48.

12 U.S.C. § 1821(d)(13)(the judicial exclusion section); 12 U.S.C. § 1821(e)(3)(the section on repudiation of contracts by the agency receiver); 12 U.S.C. § 1821(d)(2)(A)(i)(the section providing that the agency succeeds to "all rights, titles, powers, and privileges of the insured depository institution. . . .").

In sum, the decision below creates a square and irreconcilable conflict with the very language of the statute itself. It eviscerates Section 1821(k), frustrates Congress's design in enacting it and has broad implications within the entirety of FIRREA. For these reasons the decision should be reviewed and reversed.

II

THE THIRD CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THIS COURT'S PRIOR RULINGS RESPECTING THE APPLICATION OF "FEDERAL COMMON LAW," AND PARTICULARLY ITS RECENT DECISION IN *O'MELVENY & MYERS v. FDIC*

This Court has long made clear that "[t]here is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). *See also O'Melveny & Myers v. FDIC*, ___ U.S. ___, 114 S.Ct. 2048, 2053 (1994) (citing *Erie*); *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision"). Instead, in determining whether federal statutory or common law will apply to a particular case, courts must "'start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *City of Milwaukee*, 451 U.S. at 317 (footnote omitted). Federal common law exists solely as a "'necessary expedient'", to be resorted to only in "a 'few and restricted' instances" in the absence of a federal statute; moreover, in those few cases where it exists, federal common law is nonetheless "'subject to the paramount authority of Congress,'" and "when

Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.* at 313-14.

Although a federal statute will not invade well established principles of common law[5] unless a statutory purpose to the contrary is present, *United States v. Texas*, ___ U.S. ___, ___, 113 S.Ct. 1631, 1634 (1993), where Congress "speaks directly" to the question addressed by federal common law, such law is supplanted. *Id.*; *City of Milwaukee*, 451 U.S. at 315. Moreover, it is not necessary for Congress to "affirmatively proscribe" the federal common law rule in order to abrogate its application. *Id.*

The only reading of Section 1821(k) consistent with its plain meaning and its legislative history is that the statute "speaks directly" to the standard of liability applicable to the directors and officers of federally chartered, federally insured depository institutions in RTC and FDIC actions. This has been the conclusion of every other court of appeals that has addressed this issue. *See Frates*, 52 F.3d at 297; *Bates*, 42 F.3d at 373; *Miramon*, 22 F.3d at 1360; *Gallagher*, 10 F.3d at 424-25. *See also CityFed*, 57 F.3d at 1250, 1252, A-39-40, 44 (Mansmann, J., dissenting). Indeed, as the Court of Appeals for the Fifth Circuit stated: "It is difficult to conceive how congress could more clearly 'speak directly' to the issue of the standard of care for personal liability of directors and officers of federally-insured depository institutions." *Miramon*, 22 F.3d at 1361.

Only last term, in *O'Melveny & Myers*, this Court prohibited the creation and use of federal common law in a damage action brought against the former lawyers for a failed savings

[5] As the majority below effectively acknowledged (57 F.3 at 1247 n.16, A-32 n.16), the "federal common law" of officer and director liability, to the extent it exists, is anything but "well established."

bank by the FDIC in its capacity as receiver for the institution. This Court emphasized that, in determining the appropriate rule of decision in such a case:

> we of course would not contradict an explicit federal statutory provision. Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed. . . .

114 S.Ct. at 2054. Yet the Third Circuit majority did exactly that in concluding that Section 1821(k), an explicit federal statute, enacted by Congress as part of a comprehensive federal legislative scheme (FIRREA), had no application whatsoever in the case of federally insured, federally chartered, depository institutions.

In addition, in *O'Melveny & Myers* this Court specifically identified Section 1821(k) as one of several provisions of FIRREA that created "special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver." 114 S.Ct. at 2054. The Court rejected the argument that such provisions could somehow be viewed as "non-exclusive" grants of rights that were capable of being "supplemented or modified by federal common law," as well as the argument relied on by the majority below (57 F. 3d at 1248, A-34) that the strong federal interest in recovering money from those whose actions may have caused losses to financial institutions afforded the courts the right to amplify such specific Congressional grants of authority by creating a parallel federal common law. *Id.* To annex such additional federal common law rules to FIRREA, the Court stated, "is not to 'supplement' this scheme, but to alter it." *O'Melveny & Myers*, 114 S.Ct. at 2054.

Despite all of this, and even though the Third Circuit majority was well aware of this Court's decision in *O'Melveny & Myers* -- and in fact cited the decision in its opinion (*see* 57 F.3d at 1235, 1245, A-9, 28) -- it inexplicably ignored the decision's teaching. The majority opinion contradicts an explicit federal statutory provision -- Section 1821(k) -- making

it inapplicable to any federally chartered institution, notwithstanding the clear language of the statute making it applicable to all "insured depository institutions," and impermissibly falls back on judge-made "federal common law" to fill the void thus created. The Third Circuit did not simply create additional federal common law to supplement FIRREA, as the Ninth Circuit did in *O'Melveny & Myers*. Rather, it held that the very subject addressed by Section 1821(k) -- the liability of officers and directors of insured depository institutions -- was to be governed *exclusively* by federal common law where the institution was federally chartered, even though the statute itself recognizes no such distinction. Such reliance on judge-made federal common law is impermissible because it disregards the preeminent role of Congress in designating what constitutes federal law, and is flatly at odds with *O'Melveny & Myers*.[6]

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[6] The majority decision below appears to suggest that there may in fact be a body of "federal common law" applicable to the alleged liability of officers and directors of federally insured depository institutions. This is by no means clear. The majority cites to this Court's decision in *Briggs v. Spaulding*, 141 U.S. 132 (1891), as a possible source of federal common law. 57 F.3d at 1247, n.16, A-32 n. 16. *Briggs*, however, was decided during the era of *Swift v. Tyson*, 41 U.S. 1 (1842), nearly half a century before this Court's decision in *Erie*. *Briggs* has been cited by this Court only once since *Erie*, and that was in a footnote in a dissenting opinion. *See Bangor Punta Oper. Inc. v. Bangor & Aroostook R. Co.*, 417 U.S. 703, 721 n. 1 (1974) (Marshall, J., dissenting).

Moreover, to the extent that there did exist, prior to FIRREA, a federal common law of officer and director liability, Petitioners believe it is clear that the applicable standard of liability thereunder is gross negligence or the equivalent thereof, and not any lesser standard. *See* Ronald W. Stevens & Bruce H. Nielson, *The Standard of Care for Directors and Officers of Federally Chartered Depository Institutions: It's Gross Negligence Regardless of Whether Section 1821(k) Preempts Federal Common Law*, 13 ANN. REV. BANKING L. 169 (1994). Accordingly, there is no basis for the majority's assertion -- which apparently was central to its holding -- that reading Section 1821(k) as supplanting federal common law would create differing standards of liability for officers and directors of federally chartered institutions, either pre- or post-FIRREA or before and after a

(Footnote continued)

Since even in the best of circumstances, federal common law exists only in "a 'few and restricted' instances", to fill gaps in federal statutory law, and since Congress has now addressed the standard of care issue in Section 1821(k), any federal common law in this area that may have existed prior to the passage of FIRREA necessarily "disappears." *City of Milwaukee*, 451 U.S. at 314. The Third Circuit's decision to the contrary is directly in conflict with the established precedent of this Court, and should therefore be reviewed and reversed.

III

THE THIRD CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE DECISIONS OF ALL FOUR CIRCUIT COURTS OF APPEALS THAT HAVE PREVIOUSLY ADDRESSED THIS ISSUE

Prior to the Third Circuit's decision in this case, the courts of appeals for four other circuits had addressed the issue of the preemptive effect of Section 1821(k) on federal common law. *See Resolution Trust Corp. v. Frates*, 52 F.3d 295 (10th Cir. 1995); *FDIC v. Bates*, 42 F.3d 369 (6th Cir. 1994); *Resolution Trust Corp. v. Miramon*, 22 F.3d 1357 (5th Cir. 1994); *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416 (7th Cir. 1993). Each of those courts held that Section 1821(k) supplants federal common law and provides the exclusive source of law in civil actions for money damages against officers and directors of federally chartered depository institutions.

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receivership. 57 F.3d at 1246-47, A-31-32. Indeed, post-FIRREA' a federal court charged with determining the "federal common law" standard of liability for officers and directors of a federally chartered financial institution (whether or not in receivership) would be duty-bound to choose gross negligence, since Congress has made clear, in Section 1821(k), that this is its preference in actions involving all "insured depository institutions." *See Wallis v. Pan American Petrol. Corp.*, 384 U.S. 63, 69 (1966) ("If there is a federal statute dealing with the general subject, it is a prime repository of federal policy and a starting point for federal common law.").

Frates, 52 F.3d at 297; *Bates*, 42 F.3d at 373; *Miramon*, 22 F.3d at 1364; *Gallagher*, 10 F.3d at 424.

The courts of appeals for the Fifth, Sixth, Seventh and Tenth Circuits began their analyses by noting the extremely limited role played by federal common law, especially in areas where Congress has already legislated, such as bank officer and director liability. *Frates*, 52 F.3d at 297; *Bates*, 42 F.3d at 370-71; *Miramon*, 22 F.3d at 1360; *Gallagher*, 10 F.3d at 424-25. Relying on the established precedent of this Court discussed in Point II, *supra*, these circuit courts noted that when, as here, Congress "speaks directly" to an issue, any federal common law relating to that issue is supplanted. *Frates*, 52 F.3d at 297 (citing *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981)); *Bates*, 42 F.3d at 371 (citing *City of Milwaukee* and *United States v. Texas*, ___ U.S. ___, ___, 113 S.Ct. 1631, 1634 (1993)); *Miramon*, 22 F.3d at 1360 (same); *Gallagher*, 10 F.3d at 424-25 (same).

Each of these four courts of appeals held conclusively that Section 1821(k) speaks directly to the issue of the standard of liability to which officers and directors of federally insured depository institutions will be held. Indeed, as the Court of Appeals for the Fifth Circuit stated: "It is difficult to conceive how Congress could more clearly 'speak directly' to the issue of the standard of care for personal liability of directors and officers of federally-insured depository institutions." *Miramon*, 22 F.3d at 1361.

The courts of appeals for the Fifth, Sixth, and Seventh Circuits then examined the so-called "savings" clause of Section 1821(k), which the RTC has argued (and the majority below agreed) preserves a federal common law cause of action against officers and directors of failed federally chartered institutions. *Bates*, 42 F.3d at 372; *Miramon*, 22 F.3d at 1361-62; *Gallagher*, 10 F.3d at 420. Each court concluded that, based upon general principles of statutory interpretation, the savings clause could not possibly be construed as saving federal common law. *Bates*, 42 F.3d at 372; *Miramon*, 22 F.3d at 1361-62; *Gallagher*, 10 F.3d at 420. *See also Frates*, 52 F.3d at 297 ("we

believe *Gallagher*, *Miramon*, and *Bates* have correctly resolved the [federal common law displacement] issue . . . and we see no reason to depart from or add to the analysis . . . .").

These courts concluded that if the savings clause was construed to preserve federal common law actions for simple negligence, then the language of the substantive sentence of Section 1821(k), which specifically enunciates a cause of action for gross negligence, would be rendered meaningless surplusage and a nullity. *Bates*, 42 F.3d at 372; *Miramon*, 22 F.3d at 1361-62; *Gallagher*, 10 F.3d at 420. Based on this analysis, the courts of appeals for these four circuits concluded that Section 1821(k) preempted any federal common law and established a gross negligence standard of care for officers and directors of failed federally chartered financial institutions.

Incredibly, however, the Third Circuit came to the conclusion that Section 1821(k) -- a *federal* statute which by its terms applies to *all* "insured depository institutions," a term whose definition includes *both* state and federally chartered institutions (*see* 12 U.S.C. § 1813(c)(2)) -- does not address the liability of directors and officers of *federally* chartered depository institutions *at all*. Instead, in an astonishing -- and entirely unsupportable (*see*, Point I, *supra*) -- act of mind-reading by the judiciary, the Third Circuit announced that, in enacting Section 1821(k), Congress intended only to preempt *state* statutes that set a higher threshold of liability than gross negligence (*i.e.*, the so-called state "insulating" statutes). The Third Circuit therefore determined that Section 1821(k) applies only to *state* chartered institutions, and that in cases involving federally chartered institutions, "federal common law" provides the exclusive source of law.

In so holding, the Third Circuit created a square and irreconcilable conflict amongst the circuits, which requires resolution by this Court.

IV

THE THIRD CIRCUIT'S DECISION IS SO CLEARLY ERRONEOUS, SO CLEARLY CONTRARY TO RECENT CONTROLLING SUPREME COURT PRECEDENT, AND OF SUCH POTENTIALLY WIDESPREAD SIGNIFICANCE THAT SUMMARY REVERSAL OF THE JUDGMENT BELOW IS APPROPRIATE

Supreme Court Rule 16.1 allows the Court to dispose of cases without full briefing and argument. That rule provides:

> After considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits.

Summary disposition pursuant to Rule 16.1 has long been used by this Court in cases where a lower court has failed to follow clearly controlling precedent of this Court. *See, e.g.*, *Mireles v. Waco*, 502 U.S. 9 (1991); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *Arthur v. Colorado*, 380 U.S. 250 (1965); *United States v. Haley*, 358 U.S. 644 (1959).

The present case is an appropriate one for such a disposition. As discussed in Point I, *supra*, the decision of the court of appeals is clearly at odds with the plain language of Section 1821(k) and violates well-established rules of statutory construction. In addition, as shown in Point II, *supra*, the court of appeals' determination to look to "federal common law" as the source of law in cases involving the liability of officers and directors of federally chartered depository institutions, when Congress has spoken directly to this issue in Section 1821(k), thoroughly ignores this Court's clear instructions on the creation and application of such judge-made law in *City of Milwaukee v. Illinois* and *O'Melveny & Myers v. FDIC*. The court of appeals' decision is also in conflict with the holdings of each of the other four circuit courts of appeals to address this issue, as shown in Point III, *supra*.

Ordinarily, these factors alone would be sufficient to warrant review by this Court. Here, however, such review -- and, we strongly urge, summary reversal -- is of particular importance because of the potentially widespread significance of the decision below, both in numerous pending and future cases, and to the depository institution industry as a whole. There are presently pending over one hundred cases brought by the RTC against directors and officers of failed depository institutions. *See* Resolution Trust Corp., Division of Legal Services, Professional Liability Section, *Semiannual Report, April 1, 1995 Through September 30, 1995*, (1995). A substantial portion of these involve federally chartered institutions, in which the interpretation of Section 1821(k) will likely be determinative. *Id.* While the RTC will cease to exist at the end of this year, the FDIC will assume responsibility for prosecuting these cases (*id.* at 2), and will also undoubtedly exercise its authority under FIRREA to bring cases in the future (as it has in the past) to recover damages from officers and directors of insured depository institutions. *Id.* The clear and irreconcilable conflict that has developed on the source-of-law issue between the Third Circuit, on the one hand, and the Fifth, Sixth, Seventh and Tenth Circuits, on the other hand, will surely cause confusion -- and disparate and inconsistent results -- in such present and future cases unless promptly resolved by this Court. Finally, experienced and careful businesspersons will be reluctant to serve as officers and directors of depository institutions in the climate of uncertainty created by the Third Circuit's decision, and such institutions will find it difficult to attract and retain the best qualified management in this environment. For all these reasons, summary disposition of this matter is appropriate.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to review the Third Circuit's decision that Section 1821(k) does not supplant "federal common law" regarding the standard of liability for officers and directors of failed federally chartered financial institutions, and should summarily reverse that decision.

Respectfully submitted,

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December 12, 1995

APPENDIX

Filed June 23, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-5307

RESOLUTION TRUST CORPORATION, in its capacity as receiver for CITY SAVINGS, F.S.B., and the RESOLUTION TRUST CORPORATION, in its corporate capacity

v.

CITYFED FINANCIAL CORP.; RICHARD E. SIMMONS; K. MICHAEL DEFREYTAS; JOHN W. ATHERTON, JR.; GORDON E. ALLEN; ALFRED J. HEDDEN; PETER R. KELLOGG; JOHN KEAN, JR.; GILBERT G. ROESSNER; GEORGE E. MIKULA; JAMES P. MCTERNAN; VICTOR A. PELSON; MARSHALL M. CRISER

(Trenton New Jersey District Civil No. 92-cv-05261)

RESOLUTION TRUST CORPORATION, in its capacity as receiver for CITY SAVINGS, F.S.B.

v.

JOHN W. ATHERTON, JR.; GORDON E. ALLEN; ALFRED J. HEDDEN; PETER R. KELLOGG; JOHN KEAN, JR.; GILBERT G. ROESSNER; JAMES P. MCTERNAN

(Trenton New Jersey District Civil No . 93-cv-01811)

Resolution Trust Corporation, in its capacity as Receiver for City Savings, F.S.B., Appellant in No. 94-5307

NO. 94-5308

RESOLUTION TRUST CORPORATION

v.

ALFRED J. SCHUSTER; THOMAS J. LYNAM; MARTIN R. SIEGEL; RICHARD P. PEARLMAN; JOAN C. MOONAN, individually and as Executrix of the Estate of Robert J. Moonan; EUGENE J. ELIAS; GEORGE HURLEY; WILLIAM B. BRICK; JAMES W. DWYER; HARRY H. JAEGER; JOHN R. HIPPLE; JOHN C. LAURICELLA; LOUIS A. IATAROLA

(New Jersey District Civ. No. 93-cv-02560)

Martin R. Siegel, and Joan C. Moonan, as Executrix of the Estate of Robert J. Moonan and individually, Appellants in No. 94-5308

On Appeal From the United States District Court
For the District of New Jersey
D.C. Civ. Nos. 92-cv-05261, 93-cv-01811, 93-cv-02569

Argued: November 8, 1994

Before: BECKER, MANSMANN, and ALITO, *Circuit Judges.*

(Filed June 23, 1995)

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

In 1989, Congress enacted § 212(k) of the Financial Institutions, Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") (codified at 12 U.S.C.A. § 1821(k) (1989)), which provides:

> *Liability of directors and officers.*—A director or officer of an insured depository institution *may* be held personally liable for monetary damages in any civil action by, on behalf of, or at the request or direction of the Corporation . . . acting as conservator orreceiver of such institution . . . *for gross negligence*, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are deemed and determined under applicable State law. *Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.*

12 U.S.C.A. § 1821(k) (emphases added). These interlocutory appeals, brought pursuant to 28 U.S.C.A. § 1292(b) (1993), require us to address, with regard to this provision, two important questions of first impression in this circuit — whether Congress, by its enactment of § 1821(k), (1) preempted state law, and/or (2) displaced federal common law actions that impose liability against directors and officers of insolvent federally insured depository institutions for conduct less culpable than gross negligence (e.g. for ordinary negligence).

Section 1821(k) was passed by Congress in response to the enactment by various states, during the middle and late 1980s, of lenient director liability statutes that generally provided directors with protection from gross negligence claims by limiting the grounds for liability to instances of reckless, willful and wanton boardroom misconduct. This section of FIRREA permits the Resolution Trust Corporation ("RTC") to seek recovery for such directors' and officers' gross negligence, while preserving the RTC's rights under "other applicable law." The particular questions raised by these appeals relate to whether Congress intended its reference to "other applicable law" to include state law and federal common law.

The appeals arise from cases brought by the RTC in the district court for the District of New Jersey on behalf of two insolvent depository institutions — United Savings and Loan of Trenton, New Jersey ("United Savings") and City Federal Savings Bank ("City Federal") in Bedminster, New Jersey — against certain former directors, officers and employees of these institutions ("the defendants"). The RTC brought claims

under New Jersey law against former directors and officers of United Savings, a state chartered institution, (the "United Savings defendants") and federal common law claims against former directors and officers of City Federal, a federally chartered institution, (the "City Federal defendants").

In the United Savings action, the district court denied the defendants' motion for dismissal and summary judgment as to the RTC's state law claims, concluding that § 1821(k) did not preempt any available actions for negligence and breach of fiduciary duty under New Jersey law. In the City Federal action, the district court granted the defendants' motion to dismiss the RTC's federal common law claims, concluding that the enactment of § 1821(k) supplanted any available federal common law actions for negligence and breach of fiduciary duty.[1]

Courts of appeals that have considered these issues have concluded that § 1821(k) does not preempt state law,[2] but that it does displace federal common law.[3] We agree that this provision does not preempt any available state law negligence or fiduciary duty claims; however, we disagree with the conclusion that Congress intended by enactment of this statute to supplant the RTC's ability to bring such actions under federal common law. Accordingly, we will affirm the district court's

[1] In referring to the supplanting or displacement of federal common law by federal statutory enactments, we refrain from the use of the term "preemption" so as to avoid any confusion with the alternative question of state law preemption and its various incidents, which is also addressed in this opinion. *See Milwaukee v. Illinois,* 451 U.S. 304, 317 n.9 101 S. Ct. 1784, 1792 n.9 (1981) (illustrating the confusion which can result when the term "preemption" is used to refer to the displacement of federal common law by federal statutory enactments).

[2] *See FDIC v. McSweeney,* 976 F.2d 532 (9th Cir. 1992), *cert. denied,* 113 S. Ct. 2440 (1993); *FDIC v. Canfield* 967 F.2d 443 (10th Cir.) (en banc), *cert. dismissed,* 113 S. Ct. 516 (1992).

[3] *See RTC v. Frates,* 52 F.3d 295 (10th Cir. 1995); *FDIC v. Bates,* 42 F.3d 369 (6th Cir. 1994); *RTC v. Miramon,* 22 F.3d 1357 (5th Cir. 1994); *RTC v. Gallagher,* 10 F.3d 416 (7th Cir. 1993).

order in the United Savings action and reverse the court's order in the City Federal action.

I. *FACTS AND PROCEDURAL HISTORY*

The RTC, which has been appointed receiver of both United Savings and City Federal,[4] brought these actions on behalf of both insolvent institutions pursuant to 12 U.S.C.A. § 1821(d)(2)(A)(i) (1989), which provides that the RTC succeeds, upon its appointment as receiver, to all rights, titles, powers and privileges of such institutions, including claims arising out of the conduct of the institutions' directors and officers. *See O'Melveny & Myers v. FDIC,* __U.S.__, 114 S. Ct. 2048, 2054 (1994) (recognizing that upon its appointment as receiver, the RTC "obtain[ed] the rights 'of the insured depository institution' that existed prior to receivership" (quoting 12 U.S.C.A. § 1821(d)(2)(A)(i))).

A. *United Savings*

In the United Savings action, the RTC alleges that the defendants failed to discharge their duties and obligations properly as directors, officers and members of United Bank's lending committees in connection with their consideration, approval and subsequent oversight of at least ten large acquisition, development and construction loans made to various borrowers between 1984 and 1990. The RTC's complaint alleges breach of fiduciary duty and ordinary negligence under New Jersey law, as well as gross negligence under both New Jersey law and § 1821(k) in the approval of these loans, which allegedly resulted in a loss to United Savings of approximately $12.7 million.

In particular, the RTC alleges that the defendants violated their duty of care by: (1) not hiring experienced lending underwriters or managers; (2) failing to reduce underwriting

[4] The Director of the Office of Thrift Supervision of the U.S. Treasury Department ("OTS") appointed the RTC as Receiver of both institutions, declaring City Federal insolvent on December 7, 1989 and United Savings insolvent on June 15, 1990.

guidelines to a written form; (3) approving large loans after closing had already taken place; (4) maintaining inadequate appraisal procedures (often relying on appraisals provided by the borrower); (5) failing to maintain adequate internal controls; (6) not returning funds during the construction phase of commercial properties pending issuance of final occupancy permits; and (7) generally operating United Savings in an unsafe and unsound manner. According to the RTC, the defendants continued these practices despite warnings by regulators, outside directors and accountants. The RTC does not allege, however, any self-dealing, conflict of interest, bad faith or fraud on the part of the defendants.

In response to the RTC's complaint, the defendants moved to dismiss, or in the alternative for summary judgment, as to all New Jersey law claims based on ordinary negligence or breach of fiduciary duty, arguing that § 1821(k) preempts the RTC's right to bring such claims. The district court entered an order denying defendants' motion and then granted the defendants' request to certify the court's order for interlocutory appeal pursuant to 28 U.S.C.A. §1292(b) (1993).[5] We granted the petition for leave to appeal.[6]

[5] While the question of federal common law preemption was also certified by the district court in the United Savings action, the RTC now concedes that, absent the application of § 1821(k), only state law governs cases involving the liability of directors and officers of state-chartered institutions such as United Savings, while federal law exclusively governs such cases when the institution is federally chartered, like City Federal. This concession flows from the RTC's recognition that the applicable law governing the liability of officers and directors for their stewardship of the corporation is the law of the jurisdiction of incorporation. *See RTC v. Chapman*, 29 F.3d 1120, 1122 (7th Cir. 1994) (reaching this conclusion under the "venerable choice-of-law principle known as the internal affairs doctrine").

[6] In denying the United Savings defendants' motion to dismiss all negligence and breach of fiduciary duty claims under New Jersey law, the district court also rejected the defendants' argument that the business judgment rule as applied by New Jersey courts precludes any claims against independent, disinterested directors in the absence of an allegation

(Footnote continued)

B. *City Federal*

In the City Federal action, the RTC alleged that the defendants failed to discharge their duties and obligations properly as directors and officers of City Federal in connection with their consideration, approval and subsequent oversight of several large acquisition, development and construction loans made to various borrowers during 1985 through 1989. The RTC's complaint alleges breach of fiduciary duty, negligence under federal common law, and gross negligence under both federal common law and § 1821(k) in the approval of these loans, which allegedly resulted in damages to City Federal of approximately $100 million. In particular, the RTC alleges that the defendants violated their duty of care by: (1) failing to obtain and verify necessary financial information from borrowers; (2) maintaining inadequate appraisal procedures; (3) consistently loaning funds based on excessively high

of self-dealing, conflict of interest, bad faith or fraud. While we certified this interesting and important issue for interlocutory appeal, we now conclude that it is not ripe for decision. *See Michota v. Anheuser-Busch, Inc.*, 755 F.2d 330, 336 (3d Cir. 1985) (declining to decide an issue certified as part of an interlocutory appeal pursuant to § 1292(b) and "remand[ing] it for resolution in the proper course of the remaining litigation"). Resolving this question at this stage of the litigation would require us to prescribe the scope of the protection provided by the business judgment rule to directors and officers under New Jersey case law without the benefit of greater factual development in this case. As the new *Restatement of Corporate Governance* recognizes, "[t]he application of duty of care standards is . . . [a] heavily *fact oriented*" analysis. PRINCIPLES OF CORPORATE GOVERNANCE § 4.01 Cmt. (1994) (emphasis added) ("The application of duty of care standards is . . . shaped by evidence of what can reasonably be expected of directors and officers in the context of the functioning of the modern corporation."). Given the fact-intensive nature of the law in this area, we conclude that the preferable course is to permit the district court's order denying the United Savings defendants' motion for summary judgment to stand so that greater factual development can occur. This course will allow the district court better to predict the scope of protection that the New Jersey Supreme Court would accord the defendants under the business judgment rule by providing the court with the opportunity to evaluate the defendants' conduct vis-a-vis New Jersey case law.

loan-to-value ratios that violated mandatory limits placed on such ratios; (4) making repeated imprudent long-range commitments to future lending or funding; (5) failing to monitor loan disbursements and the ongoing status of projects and loans; (6) improperly waiving risk limitations and other conditions contained in loan commitments to certain borrowers; (7) failing to require and verify that necessary permits and approvals were obtained before funding the loans; (8) improperly assessing the value of guarantees given as security for the loans; and (9) not requiring adherence to the Banks lending policies and procedures. In this action, the RTC does not allege any self-dealing, conflict of interest, bad-faith or fraud on the part of the defendants.

The City Federal defendants responded to the RTC's complaint by moving to dismiss all claims, other than gross negligence, arguing that § 1821(k) established an exclusive federal gross negligence standard of care for directors and officers of failed federally chartered financial institutions which supplanted any simple negligence claims available under federal common law. The district court agreed with the defendants' argument and accordingly granted their motion to dismiss the RTC's complaint to the extent that it alleged claims other than gross negligence. The district court granted the RTC's request to certify the court's order pursuant to 28 U.S.C. § 1292(b), and we granted the petition for leave to appeal.

II. *FINANCIAL INSTITUTIONS, REFORM, RECOVERY, AND ENFORCEMENT ACT OF 1989*

All parties agree that in enacting § 1821(k) Congress intended to preempt state laws which limit the liability of directors and officers to instances of conduct more culpable than gross negligence (i.e. intentional misconduct). At issue in these appeals is whether Congress, by its enactment of § 1821(k), also preempted state law or displaced federal common law actions that impose liability for conduct less culpable than gross negligence (e.g. ordinary negligence). As we have stated, the question of the interpretation of § 1821(k) is one of first impression in this circuit. Our review of the

construction of federal statutes is plenary. *See Doherty v. Teamsters Pension Trust Fund,* 16 F.3d 1386, 1389 (3d Cir. 1994).

A. *The Plain Meaning of the Statute*

"The starting point for interpretation of a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 835, 110 S. Ct. 1570, 1575 (1990) (internal quotation marks omitted).

The disposition of these appeals turns on the breadth of § 1821(k)'s last sentence, which has become known as the "savings clause." Congress provided that "[n]othing in this paragraph shall impair or affect *any right* of the Corporation under *other applicable law.*" 12 U.S.C.A. § 1821(k) (emphases supplied). The RTC contends that this sentence manifests congressional intent to preserve the RTC's ability to seek recovery from directors and officers under *all* "other applicable laws," including the less forgiving negligence and fiduciary duty standards of care under state law and federal common law. We agree.[7]

[7] We note that, in addition to focusing on the statute's saving clause, courts concluding that § 1821(k) did not preempt state laws which held directors and officers liable for conduct less culpable than gross negligence, have also gleaned the limited preemptive intent of Congress from its use of the word "may" as opposed to "may only" in the first sentence of the provision: "[a] director or officer . . . *may* be held personally liable for monetary damages . . . for gross negligence." In *Canfield,* for example, the court read "may" as a "permissive term" that "does not imply a limitation on the standards of officer and director liability," refusing to construe the first sentence of the section as saying that an officer or director *may only* be held personally liable for gross negligence." *Canfield,* 967 F.2d at 446 (citing *Rose v. Rose,* 481 U.S. 619, 626-27, 107 S. Ct. 2029, 2034 (1987), where the Court refused to read "may" as establishing anything but discretionary power). The Ninth Circuit in *McSweeney* agreed. *McSweeney,* 976 F.2d at 537 ("Had Congress intended this authorizing provision to limit the FDIC . . . it would have inserted the word 'only' in the sentence."). *But see Bates,* 42 F.3d at 371 (rejecting this reading as

(Footnote continued)

The defendants contend that, when Congress referred to "other applicable law" in § 1821(k), it intended to refer only to the RTC's ability to pursue regulatory actions under other sections of FIRREA, such as the RTC's rights under 12 U.S.C.A. § 1818(b)-(g) (West Supp. 1995) to seek removal of negligent directors and officers and to issue "cease and desist" orders in cases of simple negligence. But Congress could not have intended to restrict the RTC to such a limited and specific set of legal claims by a general reference in this provision to "other applicable law." When Congress limited its reference to the law of a particular jurisdiction in other sections of FIRREA, it did so with *specific* language. *See, e.g.*, 12 U.S.C.A. § 1821(c)(3)(B) (1993) ("powers imposed by *State law*" (emphasis added)); 12 U.S.C.A. § 1821(c)(4) (1993) ("notwithstanding any other provision of *Federal law, the law of any State, or the constitution of any State*" (emphasis added)). In particular, when Congress limited its reference to other portions of FIRREA itself, it also did so specifically. *See, e.g.*, 12 U.S.C.A. § 1821(e)(3)(C)(ii) (West Supp. 1995) ("except as otherwise specifically provided in *this section*" (emphasis added)). Given the specific nature of these references in other portions of FIRREA, we think that § 1821(k)'s reference to other applicable law plainly demonstrates an intent to refer to *all* other applicable law.

Such a reading of the statutory language is consistent with the Supreme Court's decision in *Patterson v. Shumate*, 504

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placing "undue emphasis on the word 'may,' which does not modify the substance of the provision"); *Miramon*, 22 F.3d at 1361 (same); *Gallagher*, 10 F.3d at 420 (same).

We decline to rest our reading of the text of § 1821(k) primarily on the belief that Congress intended to demonstrate its limited preemptive intent through the use of the word "may" in the statute's first sentence. We do acknowledge, however, that such a construction is consistent with what we believe to be otherwise obvious from the statute's language and legislative history—Congress intended to permit the RTC to continue to seek recovery under laws that hold directors and officers to a more stringent standard of care.

U.S. 753, 112 S. Ct. 2242 (1992), where the Court read a reference to "applicable nonbankruptcy law" in 11 U.S.C.A. § 541(c)(2) to encompass "any relevant nonbankruptcy law, including federal law such as ERISA." *See also Reich v. Webb*, 336 F.2d 153, 158 (9th Cir. 1964) (reading the language "any other law" of 12 U.S.C. § 1464(d)(1) as authorizing federal regulators to enforce "common law fiduciary responsibilities . . . through appropriate court action"), *cert. denied* 380 U.S. 915 (1965).

Moreover, reading the savings clause to provide for a broad retention of existing rights is supported by its placement at the conclusion of the statutory provision. In *Abbott Lab. v. Gardner*, 387 U.S. 136, 145, 87 S. Ct. 1507, 1513-14 (1967), the Court affirmed that "it is difficult to think of a more appropriate place to put a *general saving clause* than where Congress placed it—*at the conclusion of the section* setting out a special procedure for use in certain specified instances." *Id.* (emphases added).

B. *The Legislative History*

Our reading of § 1821(k)'s language is supported by clear legislative history, which, in our view, manifests an effort to place a floor, not a ceiling, on the liability of directors and officers. *See Chapman*, 29 F.3d at 1126 (Posner, C.J., dissenting) ("The purpose of section 1821(k), as the timing of the statute's enactment and other features of its history make clear, was to place a floor under the liability of directors of savings and loan associations, which were falling like ninepins."). We necessarily begin our examination of § 1821(k)'s legislative history with an inspection of "the provisions of the whole law, and . . . its object and policy." *Dole v. United Steelworkers*, 494 U.S. 26, 35, 110 S. Ct. 929, 934 (1990).

Section 1821 (k) was enacted as part of FIRREA, a massive 371-page legislative package that had among its primary purposes, as evident in the opening provision of the statute, "strengthen[ing] the enforcement powers of Federal regulators of depository institutions" and "strengthen[ing] the *civil* sanctions and criminal penalties for defrauding or otherwise

damaging the depository institutions and their depositors." Pub. L. No. 101-73, § 101(9)-(10), 103 Stat. 183, 187 (1989) (emphasis added) (reprinted in 12 U.S.C.A. § 1811 note (West Supp. II 1990)). An overriding purpose in enacting this legislation was to facilitate an effort to "seek out and punish those that have committed wrongdoing in the management of the failed institutions,"[8] not to protect such directors and officers from claims of ordinary negligence.

Section 1821(k), in particular, was, as we have already noted, a reaction to the enactment by various states, during the middle and late 1980s, of lenient director liability statutes which protected directors from gross negligence claims by limiting their liability to instances of reckless, willful and wanton boardroom misconduct.[9] States enacted these laws out of a policy concern that too stringent a standard of care would impede the ability of a corporation to attract and retain the most qualified individuals as corporate directors. This "race to the bottom"[10] among certain states was a reaction to the

[8] *Presidents News Conference on Savings Crisis and Nominees*, N.Y. Times, Feb. 7, 1989, at D8, col. 1 (statement of President Bush).

[9] *See, e.g.*, IND. Code ANN. §23-1-35-l(e)(2) (Burns 1994) (declaring that directors are not liable unless their conduct constitutes at least "willful misconduct or recklessness"); FLA. STAT. ANN.. § 607.0831 (West 1994) ("recklessness or an act or omission which was committed in bad faith or with malicious purpose"); OHIO REV. CODE ANN. § 1701.59(D) (Anderson 1994) ("deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interest of the corporation"); *see also* 8 DEL. CODE ANN. § 102(b)(7) (West 1994) (permitting a company's stockholders to adopt provisions that would limit a director's liability to actions that are illegal, that constitute a breach of the separate duty of loyalty or that constitute intentional transgressions); ARIZ. REV. STAT. ANN. § 10-054(A)(9) (West 1994) (same); CAL CORP. CODE § 204(a)(10) (West 1995) (same).

[10] William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974) (describing the process whereby states follow each other in enacting changes in their corporate law that provide greater protection to officers and directors as a "race to the bottom").

Delaware Supreme Court's decision in *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), which held the directors of Trans Union Corporation liable for their ostensible gross negligence in approving a cash-out merger notwithstanding the absence of any allegations of fraud, bad-faith or self-dealing. The various states enacting these statutes rejected the result in *Van Gorkom* and sought to ensure that their domestic corporations could attract and retain qualified directors and officers by protecting them from claims of gross negligence.[11]

At the same time that states were extending protection from liability to corporate directors, the regulators of federally insured depository institutions were embarking on a concerted litigation campaign to recoup from allegedly corrupt and incompetent directors a portion of the billions of federal dollars lost in the bankruptcy of federally insured thrifts. The enactment of § 1821(k) represents an attempt to facilitate this litigation in the wake of the impediments posed by state statutes insulating directors and officers from liability for gross negligence. The debates over § 1821(k) in the Senate demonstrate this intent to facilitate the recovery effort.[12]

The original Senate provision, § 214(n) of the Act, would have allowed the RTC to sue directors and officers under "any

[11] *See generally* Daniel R. Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 Bus. Law. 1437 (1985); Harvey Gelb, *Director Due Care Liability: An Assessment of the New Statutes*, 61 TEMP. L. REV. 13 (1988).

[12] Section 1821(k) originated in the Senate; and, other than a technical change in the wording of the savings clause, no substantive debate or amendments to this provision occurred in the House or at Conference. The House replaced the Senate version of the Savings clause, which had referred to "any right, if any, of the [RTC] that may have existed immediately prior to the enactment of the FIRREA act," with the current version. The defendants in these actions, however, correctly do not attribute any substantive change in Congressional intent to the adoption of this amendment. *See McSweeney*, 976 F.2d at 541 n.9 ("We see nothing in this change to indicate an intent to expand the preemptive effect of this provision.').

cause of action available at common law, including, but not limited to, negligence . . . [and] breach of fiduciary duty." S. 774, 101st Cong., 1st Sess. § 214(n) (1989). During the Senate debate, this proposal was modified so as to scale back the *extent* of state law preemption by raising the floor on the liability of directors from "negligence" to "gross negligence."

The amendment resulted, in large part, from a concern expressed by Senator Sanford that the sweep of the original provision was too broad given the valid policy interest, expressed by states enacting legislation in response to the *Van Gorkom* decision, of attracting the best qualified individuals as directors. 135 CONG. REC. 7150-51 (Apr. 19, 1989). Senator Sanford expressed the case for the amendment as follows:

> The bill as drafted would have preempted numerous state laws which provided limited indemnification for directors and officers. These state laws were enacted largely in response to problems faced by corporations in attracting good officers and directors. . . . The amendment which the managers have accepted modifies the bill to preempt state law only in a very limited capacity. . . . [Section 1821(k)] is not a wholesale preemption of longstanding principles of corporate governance, nor does it represent a major step in the direction of establishing Federal tort standards or Federal standards of care of corporate officers and directors.

Id. Senator Riegle, the bill's floor manager, evinced agreement with these concerns, *see id.* at S4265, and introduced an amendment reducing the amount of preemption.

During its introduction, Senator Riegle again explained the purpose of the amendment:

> In recent years, many States have enacted legislation that protects directors or officers of companies from damage suits. These "insulating" statutes provide for various amounts of immunity to directors and officers. For example, in Indiana, a director or officer is liable for damages only if his conduct constitutes "willful misconduct or recklessness."
>
> The reported bill totally preempted state law in this area, with respect to suits brought by the FDIC against bank directors and officers. However, in light of the state law implications raised by this provision, the manager's amendment *scales back the scope of this preemption.*
>
> Under the managers' amendment, State law would be overruled *only* to the extent that it forbids the FDIC to bring suit based on "gross negligence" or an "intentional tort."

Id. at 7152-53 (Apr. 19, 1989) (emphases added). Senators Roth and Garn also expressed similar sentiments: the intent of this amendment was to limit, not expand, the preemptive scope of the provision. *See id.* at 7155.

The defendants, however, like the Seventh Circuit in *Gallagher,* 10 F.3d at 422-23, interpret the concerns motivating this amendment to demonstrate Congressional intent to adopt a national standard of gross negligence for actions brought by the RTC in the service of a *federal* policy of attracting qualified officers and directors to federally insured financial institutions.[13] We reject this "revisionism," since, as we have demonstrated, the evolution of § 1821(k) in the Senate does

[13] To support their position the defendants also incorrectly point to a statement made by Senator Heflin: "I think the language should be reviewed and, in my judgment, changed to ensure that financial institutions are able to attract strong and capable individuals as directors and officers." 135 CONG. REC. at 7137. As recognized by the Tenth Circuit in *Canfield,* 967 F.2d at 790, Senator Heflin's comments do not relate to § 1821(k), but rather involved a proposed change to 12 U.S.C.A. § 1818(i)(2) (Supp. 1995), which made it more difficult for the RTC to obtain civil penalties against directors and officers. *See* 135 CONG. REC. at 7138 ("I am merely recommending that due process and fairness dictate that clear standards should be included in assessment of civil penalties." (statement of Senator Heflin)).

not represent the adoption of a national standard of gross negligence over one of ordinary negligence, but rather reflects an effort to decrease the amount of state law preemption by raising the floor on the liability of directors and officers.

The limited sweep of § 1821(k) is also explicitly demonstrated in a final section-by-section report prepared by the Senate Banking Committee. This report is consistent with other contemporaneous legislative history, and it makes clear that § 1821(k) did not disturb any claims, available as a matter of state or federal law, that would hold directors and officers liable for conduct less culpable than gross negligence:

> This subsection does not prevent the FDIC from pursuing *claims under State law or other applicable Federal law,* if such law permits the officers or directors of a financial institution to be sued (1) for violating a *lower standard of care, such as simple negligence.*

135 CONG. REC. S6912 (daily ed. June 19, 1989) (emphases supplied).

The defendants would have us discount this report as post-enactment legislative history, even though it was available six weeks *before* both the Senate and the House enacted the final version of FIRREA into law. The defendants base their argument on the fact that the Senate Banking Committee did not publish this report until two months after the Senate passed an initial version of FIRREA, since the period of time between introduction and passage of the Senate's initial bill was so short. In support of this position, the defendants rely on *Clarke v. Securities Industry Ass'n,* 479 U.S. 388, 407, 107 S. Ct. 750, 761 (1987), where the Court refused to "attach substantial weight" to a statement placed in the congressional record by a sponsor of an act ten days after the law was passed. *See Gallagher,* 10 F.3d at 421-22. The Supreme Court's opinion in *Clarke* is distinguishable, however, given that the legislative history in *Clarke* involved a statement "placed in the Congressional Record 10 days after the *passage* of the . . .

Act." *Clarke,* 479 U.S. at 407, 107 S. Ct. at 761. In discounting the value of the statement at issue, the Court recognized that "*Congress* did not have [the statement] before it in *passing* the . . . Act." *Id.* In contrast, Congress (both Houses), in enacting § 1821(k), *did* have this report "before it" in passing the final version of FIRREA. Moreover, the legislative history in *Clarke* did not involve a report prepared by the congressional committee that originally considered the provision in question but rather involved a statement by a single congressman whom the Court considered not to be an "impartial interpreter of the bill." *Id.*

To support their reading of § 1821(k)'s legislative history, the defendants rely on a portion of FIRREA's Conference Report, which provides:

> Title II preempts State law with respect to claims brought by the FDIC in any capacity against officers and directors of an insured depository institution. The preemption *allows* the FDIC to *pursue claims* for gross negligence or any conduct that demonstrates a *greater disregard of a duty of care,* including intentional tortious conduct.

H.R. REP. No. 222, 101st Cong., 1st Sess., *reprinted in* 1989 U.S.C.C.A.N. 432, 437 (emphases supplied). We do not believe that the Conference Report supports the defendants' position. While the report does acknowledge that § 1821(k) preempts State law, such an acknowledgment is entirely consistent with the statute's limited preemptive intent. Moreover, the second sentence of this portion of the Conference Report acknowledges that which is evident throughout the legislative history: § 1821(k) "allows" the RTC to pursue claims for gross negligence in states not permitting such claims, but does not "limit" it from pursuing claims for ordinary negligence, when available under applicable law. *See Canfield,* 967 F.2d at 448 n.6; *McSweeney,* 976 F.2d at 539.

We are also unpersuaded by the defendants' reliance on congressional attempts to preserve more explicitly the RTC's right to bring a claim for negligence under other applicable

state or federal law by seeking to amend § 1821(k) in years following its enactment.[14] It is settled law that post-enactment legislative history should be afforded little or no weight, especially in the face of contradictory contemporaneous legislative history. *See U.S. v. Texas,* __U.S.__ , __ n.4, 113 S. Ct. 1631, 1635 n.4 (1993) ("[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress." (internal quotation marks omitted)); *U.S. v. Knox*, 32 F.3d 733, 749 n.14 (3d Cir. 1994) ('[P]ost-enactment legislative history . . . should be given little, if any, weight because [it] do[es] not necessarily reflect the intent of the members of Congress who originally enacted the statutory language."), *cert. denied* 115 S. Ct. 897 (1995). As this court has stated, adopting the language of Justice Scalia,

> "Subsequent legislative history" —which presumably means the post-enactment history of a statutes consideration and enactment—is a contradiction in terms.... Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote.

Id. (quoting *Sullivan v. Finkelstein,* 496 U.S. 617, 631-32, 110 S. Ct. 2658, 2667 (1990) (Scalia, J., concurring in part)).

In particular, courts should be hesitant to examine congressional attempts to amend ambiguous legislative provisions in an effort to determine the intent of a previous Congress in originally enacting the law. The fact that

[14] For example, Congressman Richard Baker of Louisiana proposed an amendment in October 1991, which provided:

> Paragraph (1) shall not be construed as impairing or affecting any right of the . . . [RTC] under any provision of applicable State or other federal law, including any provision of common law or any law establishing the personal liability of any director or officer of any insured depository institution under any standard pursuant to such law.

H.R 3435, 102d Cong., 1st Sess. § 228 (Comm. Markup Oct. 18, 1991).

Congress subsequently sought to clarify the limited preemptive intent of § 1821(k) in the face of conflicting judicial interpretations[15] is not surprising. Courts finding "retrospective" legislative intent in such proposed enactments could improperly draw inferences from unsuccessful Congressional attempts to clarify ambiguities which Congress did not perceive at the time of enactment. Such attempts simply do not shed light on the intent of the Congress that originally enacted the provision.

In sum, we conclude that the legislative history associated with FIRREA, and particularly § 1821(k), does not manifest Congressional intent to adopt a uniform gross negligence standard of care for directors and officers of bankrupt federally insured depository institutions. Rather, the legislative history reflects an effort to ensure that directors and officers of state-chartered institutions (whom Congress viewed as responsible for a portion of the significant amount of federal money lost in the insolvency of such institutions) not escape liability to the RTC under the shield of certain state laws that had effectively insulated them even from claims based on their grossly negligent or reckless conduct. The intent of Congress was to strengthen, not weaken, the RTC's hand in pursuit of directors and officers. Mindful of this intent, and of our reading of the statute's language, we now directly address, in turn, the particular questions whether Congress preempted state law, or supplanted federal common law claims brought by the RTC for negligence and breach of fiduciary duty.

[15] The dispute in the Courts of Appeals about the intended preemptive effect of § 1821(k) was preceded by similar disagreement among district courts considering these issues at the time Congress proposed the clarifying amendment. *Compare FDIC v. Canfield,* 763 F. Supp. 533 (D. Utah 1991) (concluding that § 1821(k) preempts state law), *rev'd* 967 F.2d 443 (10th Cir. 1992) (en banc); *FDIC v. Miller,* 781 F. Supp. 1271 (N.D. Ill. 1991) (concluding that § 1821(k) displaces federal common law) *with FDIC v. Isham,* 777 F. Supp. 828 (D. Colo. 1991) (concluding that § 1821(k) does *not* preempt state law), *and FDIC v. Haddad,* 778 F. Supp. 1559 (S.D. Fla. 1991) (same).

III. *STATE LAW PREEMPTION*

Pursuant to the Supremacy Clause, U.S. Const. Art. VI, cl. 2, "state laws that 'interfere with, or are contrary to the laws of congress, made in pursuance of the constitution' are invalid." *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 604, 111 S. Ct. 2476, 2481 (1991) (quoting *Gibbons v. Ogden,* 9 Wheat 1, 211 (1824)). Federal law preempts existing state law in either of two ways: (1) through evidence of congressional intent to supplant state authority in a particular area, as expressed either through the language of the statute, *see Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S. Ct. 1305, 1309-10 (1977), or implicitly through the enactment of a federal regulatory scheme "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947); or (2) when federal law and state law actually conflict, such as when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43, 83 S. Ct. 1210, 1217 (1963), or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941).

As we have stated, both a plain reading of § 1821(k) and an interpretation of its legislative history reflect a congressional effort to expand, not constrain, the RTC's ability to recover against directors and officers by enabling it to seek recovery in those states that had adopted laws insulating officers and directors from liability. Given this interpretation of the statute and its legislative history, we conclude that Congress intended to leave room for state law to supplement § 1821(k) by permitting recovery in instances of ordinary negligence. Moreover, we do not believe that state laws subjecting directors of federally insured depository institutions to a more stringent standard of care by permitting recovery in instances of negligence conflict in any way with the congressional enactment of § 1821(k). In fact, such state laws are consistent with the

expressed congressional purpose in enacting FIRREA of *"strengthen[ing]* the enforcement powers of Federal regulators of depository institutions" and *"strengthen[ing]* the civil sanctions . . . for . . . damaging the depository institutions and their depositors." Pub. L. No. 101-73, § 101(9)-(10), 103 Stat. 183, 187 (1989) (emphases added) (reprinted in 12 U.S.C.A. § 1811 note (West Supp. II 1990)).

The two Courts of Appeals that have directly confronted this question also have reached this conclusion. In *Canfield* 967 F.2d at 443, the Tenth Circuit sitting *en banc* concluded that § 1821(k) did not preempt available state law claims that permit the RTC to recover in instances of conduct less culpable than gross negligence, and the Ninth Circuit in *McSweeney,* 976 F.2d at 532, relying on *Canfield,* reached an identical result. In addition to interpreting § 1821(k)'s language and legislative history in a manner similar to that expressed *supra,* these courts set forth several additional reasons in support of their conclusion, which we also find persuasive.

First, they rejected the contention that Congress was motivated in enacting § 1821(k) by a need for a national liability standard in view of the fact that the statute clearly calls for the application of *various* applicable state law definitions of gross negligence. 12 U.S.C.A. § 1821(k) ("as such terms are defined and determined under *applicable State law"); McSweeney,* 976 F.2d at 539; *Canfield,* 967 F.2d at 447. The *Canfield* court noted that, given the vast differences in the standards of gross negligence in the various states, *id.* ("'[T]here is . . . no generally accepted meaning [of gross negligence]'" (quoting W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 34 at 212 (5th ed. 1984)), "the statute cannot possibly, even without the last sentence, create a national standard of liability." *Canfield,* 967 F.2d at 447. We agree that the congressional use of state law formulations of gross negligence further illustrates the limited preemptive intent of Congress in enacting § 1821(k). If Congress had been motivated by a need for uniformity in the law it would not have invoked the application of alternative state

definitions of gross negligence, but rather would have called for the application of a uniform federal standard.

In addition, the *Canfield* and *McSweeney* courts also based their result on a persuasive policy concern:

> [U]nder defendants' interpretation, consider the position of an officer or director of a troubled federally insured institution in a state allowing actions for negligence. Prior to failure, liability would attach for simple negligence. After failure, liability would only attach if the officer or director could be proven grossly negligent under the applicable state definition. As the institution struggles, therefore, section 1821(k) would create an incentive for the officers and directors to allow the bank to fail. It simply cannot be that FIRREA would indirectly encourage such behavior when it was designed in part, according to its stated purposes, "to curtail . . . activities of savings associations that pose unacceptable risks to the Federal deposit insurance funds." FIRREA, Pub. L. No. 101-73, § 101(3), 103 Stat. 183, 187 (1989).

Canfield, 967 F.2d at 449; *see also McSweeney*, 976 F.2d at 540-41.

In response to this argument, the defendants correctly point out that if a director or officer purposely engages in conduct leading an institution into receivership, such actions would themselves constitute intentional conduct and indisputably result in liability under § 1821(k). *See also Canfield*, 967 F.2d at 450 n.5 (Brorby, J., dissenting). On balance, however, we find this rejoinder to the RTC's policy argument unpersuasive. Directors and officers of financial institutions are well advised of their potential liability under the law. (Indeed, the argument that too stringent a standard of care will discourage capable people from becoming or remaining as directors itself presumes a sophisticated level of knowledge on the part of such individuals.) For instance, they would undoubtedly be aware that federal receivership would insulate them from claims of negligence. Armed with this knowledge, directors

and officers of institutions chartered in states permitting such claims would have more of an incentive to engage in conduct, which the RTC could not necessarily prove rises to the level of intentional conduct or gross negligence, but which nonetheless placed the institution at greater risk of receivership.

In sum, we conclude that Congress did not intend to hinder the RTC by denying it an opportunity to recover for instances of director and officer negligence when shareholders of these institutions would have had a right under state law before receivership, to bring such an action on behalf of the corporation. Accordingly, we conclude § 1821(k) does not preempt the RTC's right to pursue a claim for conduct less culpable than gross negligence, if any are available under New Jersey law, against the United Savings defendants.

IV. *DISPLACEMENT OF FEDERAL COMMON LAW*

We next address whether, by its enactment of § 1821(k), Congress foreclosed the RTC's ability to bring a claim against officers or directors of federally chartered depository institutions under federal common law for conduct less culpable than gross negligence. The answer to the question of federal common law displacement turns on an interpretation of congressional intent. While it is unnecessary to find that Congress "had affirmatively proscribed the use of federal common law," in order to conclude that federal common law has been supplanted, *Milwaukee v. Illinois* 451 U.S. 304, 315, 101 S. Ct. 1784, 1791 (1981) (internal quotation mark omitted), "any terms of the statute explicitly preserving or preempting judge made law are of course controlling, as is clear evidence of Congressional intent to achieve such results." *In re Complaint of Oswego Barge Corp.*, 664 F.2d 327, 339 (2d Cir. 1981) ("In the absence of clearly expressed legislative intent, legislative history may provide useful guidance.").

Lacking statutory language or clear evidence of congressional intent, we must glean the intent of Congress by examining whether "the legislative scheme spoke directly" to the question previously addressed by federal common law, *Milwaukee v. Illinois*, 451 U.S. at 315, 101 S. Ct. at 1791

(internal quotation mark omitted), and assessing the "scope of the legislation." *Id.* at 314-15 n.8, 101 S. Ct. at 1791-92 n.8 (examining whether "the field has been made the subject of comprehensive legislation or authorized administrative standards.'" (quoting *Texas v. Pankey,* 441 F.2d 236, 241 (10th Cir. 1971)). In whole, our inquiry must discern the intent of Congress so as to resolve the question whether applying federal common law would constitute "filling a gap left by Congress' silence," which is proper, or involve "rewriting rules that Congress has affirmatively and specifically enacted," which is improper. *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625, 98 S. Ct. 2010, 2015 (1978).

We must begin our inquiry, as we have stated, by determining whether "any terms of the statute explicitly preserv[e] or preempt [] judge-made law." *Oswego Barge,* 664 F.2d at 339. In drafting § 1821(k), Congress provided such language, stating "[nothing in this paragraph shall impair or affect *any right* of the Corporation under *other applicable law.*" 12 U.S.C.A. § 1821(k) (emphases supplied). We read the plain meaning of this savings clause as preserving the RTC's right to proceed against directors and officers of federally-chartered institutions under federal common law. The defendants concede that before receivership City Federal ("the Corporation") had a right to bring an action against them under federal common law. Furthermore, they concede that upon receivership the RTC "obtain[ed] the rights of [City Federal,] the insured depository institution that existed prior to receivership." *O'Melveny & Myers,* 114 S. Ct. at 2054. Accordingly, we conclude the plain meaning of this provision — which, stated again, preserves *"any* right of the Corporation under *other applicable law"*—secures the RTC's ability to proceed against the defendants pursuant to City Federal's preexisting rights under federal common law. In so doing, we reject the City Federal defendants' reading of this provision's reference to "other applicable law" as one intended to invoke only the RTC's rights under other sections of FIRREA or State law. As we have demonstrated, when Congress intended to limit its reference to the law of a particular jurisdiction or to other

portions of FIRREA itself, it did so with the use of *specific* language. *See supra* pages 13-14.

Notwithstanding the plain meaning of § 1821(k)'s savings clause, the defendants contend that we must declare any available federal common law claims supplanted if Congress "spoke directly" to the question of the liability of directors and officers of insolvent depository institutions or "'occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency,'" *Gallagher,* 10 F.3d at 424 (quoting *Milwaukee,* 451 U.S. at 317, 101 S. Ct. at 1792). We think that is not enough since, as we have stated, the answer to the question of federal common law displacement, like state law preemption, must turn, in the first instance, on an interpretation of congressional intent, looking to the text of the statute and then to its legislative history.

In support of their position, the defendants rely on the Supreme Court's decision in *Milwaukee v. Illinois, supra,* which concluded that the enactment of the 1972 Amendments to the Federal Water Pollution Control Act supplanted the federal common law claim for abatement of a nuisance caused by interstate water pollution. The Court did so after examining the scope of the legislation and whether it spoke directly to the question previously addressed by federal common law. We do not believe the Supreme Court's opinion in *Milwaukee* is inconsistent with our approach.

The Court in *Milwaukee* did not reach its conclusion that federal common law was supplanted until after first examining in detail the question whether "congressional intent to preserve the federal common-law remedy . . . is evident in . . . the statute." *See Milwaukee,* 451 U.S. at 327-31, 101 S. Ct. at 1797-1800. The Court concluded that no such congressional intent was present. *Id.* In contrast, the intent of Congress surrounding the adoption of § 1821(k), as evident by both the provision's plain meaning and its legislative history, explicitly preserves any federal remedy for conduct violating a lower standard of care, such as simple negligence. The

relevant Senate Report clearly states that "this subsection does not prevent the FDIC from pursuing claims under . . . other Federal law, if such law permits the officers or directors of a financial institution to be sued (1) for violating a lower standard of care, such as simple negligence." 135 CONG. REC. S6912 (daily ed. June 19, 1989).

Moreover, we do not believe (1) that § 1821(k) "spoke directly" to the standard of care applicable to directors and officers of federally-chartered depository institutions or (2) that the scope of this legislation occupied the field. The defendants contend that in enacting § 1821(k) Congress "spoke directly" to the standard of care for directors and officers of federally chartered institutions previously governed by federal common law. We disagree. As we have demonstrated, in enacting § 1821(k) Congress sought to address the question of what standard should apply in cases where the RTC was confronted with an applicable state insulating statute, so as to ensure that the RTC could recover when the applicable state law insulated directors and officers from actions for gross negligence. While portions of FIRREA were enacted to govern both state and federally chartered institutions, *see* 12 U.S.C.A. § 1813(a)-(c) (1989), § 1821(k) was simply *not* enacted to define the standard of care applicable to federally chartered institutions governed by federal common law.

Section 1821(k) calls for the application of the "*applicable* State law" formulation of gross negligence. To read this subsection as supplanting federal common law would be to create an additional (and serious) problem, because it is unclear which formulation of gross negligence the City Federal defendants would have us apply. *See* KEETON, *supra*, at 212 (there is "no generally accepted meaning" of gross negligence). In a case involving the liability of directors and officers of a federally chartered institution, such as City Federal, no state law standard is "applicable," since *federal* law governs the liability of such individuals. *See Chapman*, 29 F.3d at 1122. If Congress had intended to speak directly to the question of what standard should apply when the depository institution is federally chartered, it would, in our view, have

addressed the question of which formulation of gross negligence should apply in such instances. The absence of such direction and the provision's reference to "applicable State law" reinforces our conclusion that Congress did not intend to address the liability standards applicable to directors and officers of federally chartered institutions in enacting § 1821(k), but rather enacted the provision for the purpose of preempting state insulating statutes.

In addition, we find it inconceivable that Congress intended to displace existing federal common law which already provided an action for conduct less culpable than gross negligence *only* in instances when an institution enters receivership. If Congress had intended to codify a federal standard of liability for directors and officers of federally chartered institutions, it would not have limited its application to circumstances where the institution entered receivership. Such an approach would, if the federal common law standard is one of ordinary negligence, create the anomalous situation of providing greater protection from liability to directors and officers when their institutions go insolvent, since before receivership directors and officers would be subject to derivative claims for ordinary negligence by the "Corporation," while after receivership such claims would be limited to gross negligence.

This scenario would create a perverse incentive for the directors and officers who manage our nation's federally chartered institutions to decrease their risk of liability by leading their institutions into receivership. *See supra* at 24-26. Congress could not have intended to create such an incentive in enacting a statute intended to "strengthen the enforcement powers of Federal regulators." Pub. L. No. 101-73, § 101(10), 103 Stat. 183, 187 (1989). Even assuming that the proper characterization of preexisting federal common law standard (as one of negligence or gross negligence) is unclear, it seems quite unlikely that Congress would have intended to reformulate the

post-receivership standard as gross-negligence, while leaving the pre-receivership standard in a state of ambiguity.[16]

[16] Given our conclusion that §1821(k) does not address the liability of directors and officers of federally chartered institutions, we need not discern whether the federal common law standard is one of ordinary or gross negligence. The district court should simply permit the RTC to proceed against the City Federal defendants under existing federal common law. We note that the Supreme Court first articulated a common law standard of care for directors and officers of federally chartered depository institutions over 100 years ago in *Briggs v. Spaulding* 141 U.S. 132 11 S. Ct. 924 (1891):

> The degree of care required depends upon the subject to which it is to be applied and each case has to be determined in view of all the circumstances....[T]he duties imposed are presumed to call for nothing more than ordinary care and attention.... If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible.... In any view the degree of care to which these defendants were bound is that which ordinarily prudent and diligent men would exercise under similar circumstances. . . .

Id. at 148, 11 S. Ct. at 929.

We recognize that *Briggs* arose before *Erie RR. v. Tompkins*, 304 U.S. 64 (1938), and hence, while addressing the liability of directors and officers of a nationally chartered bank, it did not label the articulated standard as one of federal common law. Moreover, in light of the dramatic changes to have occurred to the legal and economic environment confronted by federally-chartered depository institutions, the Supreme Court might choose to reexamine and/or refine the *Briggs* articulation of the common law standard of liability for directors and officers of such institutions.

Nevertheless, over a century later, the *Briggs* articulation of the standard of care apparently continues to apply as a matter of federal common law. For instance, in *FDIC v. Appling*, 992 F.2d 1109, 1113-14 (10th Cir. 1993), the Tenth Circuit described the standard of care for directors and officers of a federally chartered bank "as requiring such care and diligence as an ordinarily prudent man would exercise with reference to the administration and management of such a moneyed institution." *See also*

(Footnote continued)

We also reject the defendants' contention that the federal common law was supplanted because of the scope of FIRREA. Relying on the opinion in *Milwaukee*, the defendants' seek to capitalize on the fact that FIRREA created several agencies, such as the RTC, to deal with the thrift crisis, and conferred upon these institutions expanded federal regulatory powers over the activities of the officers and directors of insured financial institutions. However, *Milwaukee* does not help the defendants' position. In examining the scope of the legislation there in question, the *Milwaukee* Court relied in significant part on a number of statements in the Act's legislative history which demonstrated "the establishment of . . . a self-consciously comprehensive program by Congress." *Milwaukee*, 451 U.S. at 319, 101 S. Ct. at 1793 ("The 'major purpose' of the Amendments was 'to establish a *comprehensive* long-range policy for the elimination of water pollution.'" (quoting S. REP. No. 92-414 at 95)). The defendants In this action can point to nothing in the plain language of the statute or its legislative history to suggest that Congress, in enacting FIERREA, intended to establish a comprehensive legislative program to address the liability of directors and officers. Rather, as we have demonstrated, the congressional purpose in enacting FIRREA, and § 1821(k) in particular, was exactly the opposite.

As Senator Sanford recognized, this provision does not represent "a wholesale preemption of long-standing principles of corporate governance, nor does it represent a major step in the direction of establishing Federal tort standards or Federal standards of care of corporate officers and directors." 135 CONG. REC. at 7151. Rather than intending exhaustively to enumerate the powers available to federal regulators, Congress sought only to strengthen the RTC's ability to recover against malfeasant directors and officers of our nation's thrifts

FDIC v. Bierman, 2 F.3d 1424, 1432 (7th Cir. 1993) ("Ordinary care, in this matter as in other departments of the law, means that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances.").

by supplementing the laws that already regulated the activity of directors and officers, such as the federal common law standard of care. We cannot conclude solely from the enactment of provisions meant to enhance the powers of federal regulators that Congress intended to occupy the field and supplant existing powers already available as a matter of federal common law. Rather, Congress explicitly preserved "any right" available "under other applicable law."

In sum, the intent of Congress in enacting § 1821(k) was not to insulate directors and officers of bankrupt federally insured depository institutions from federal common law liability for conduct less culpable than gross negligence. Rather, § 1821(k) reflects, as we have demonstrated, an effort to ensure that directors and officers could not escape liability to the RTC under the shield of certain state laws that had effectively insulated them from claims based on their grossly negligent or reckless conduct. To read any more into the enactment of § 1821(k) would, as Chief Judge Posner has recognized, "make traps of its words" and perniciously turn the statute on its head, since Congress intended this provision to strengthen, not weaken, the RTC's ability to recover for director and officer misconduct. *See Chapman,* 29 F.3d at 1126-27 (Posner, C.J., dissenting) ("What would otherwise be a more stringent standard, that of simple negligence, is diluted by interpretation of a statute intended to make the liability of such directors more stringent.").

We recognize that the two Courts of Appeals to have addressed both state law preemption and the displacement of federal common law by § 1821(k) would permit the RTC to pursue an action for negligence under state law, but not under federal common law. *See Frates,* 52 F.3d at 295 and *Canfield* 967 F.2d at 443 (10th Cir.); *Chapman,* 29 F.3d at 1122 and *Gallagher,* 10 F.3d at 416 (7th Cir.). These courts have justified such a distinction by the need for greater congressional intent to preempt state law as opposed to that necessary to displace federal common law, given the federalism concerns present when state law is preempted. *Gallagher,* 10 F.3d at 424 ("'Such concerns are not implicated in the same fashion

when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of clear and manifest purpose is not required.'" *(quoting Milwaukee,* 451 U.S. at 316, 101 S. Ct. at 1792); *see also Milwaukee,* 451 U.S. at 317, 101 S. Ct. at 1792 ("[T]he assumption [is] that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." (internal quotation mark omitted)).

We agree that this generalized reasoning can result, in certain instances, in a conclusion that a particular statutory enactment did not preempt state law, yet did displace federal common law. However, in our view, the distinction is not determinative here since the plain meaning of § 1821(k) and the clear legislative history surrounding its enactment, which demonstrates that this provision was not intended to apply to federally chartered institutions, sufficiently overcome the presumption favoring the displacement of federal common law.

In reaching the contrary conclusion that § 1821(k) displaced federal common law, the courts of appeals to have considered the question have relied, in significant part, on the argument that permitting the RTC to seek recovery for a director's negligence would render § 1821(k) meaningless. The Seventh Circuit in *Gallagher* stated that "[r]eading the 'savings clause' as preserving a federal common law standard of liability for less culpable conduct than gross negligence would render the substantive portion of § 1821(k) surplusage." *Gallagher.* 10 F.3d at 420 ("It is illogical that Congress intended in one sentence to establish a gross negligence standard of liability and in the next sentence to eviscerate that standard by allowing actions under federal common law for simple negligence."); *see also Bates,* 42 F.3d at 372 ("If the court reads the savings clause to preserve simple negligence claims, then the gross negligence standard explicitly articulated . . . is redundant, meaningless surplusage."); *Miramon,* 22 F.3d at 1361. Moreover, in articulating this "surplusage" argument, the Fifth Circuit in *Miramon* rhetorically inquired — "Why would the RTC ever bring an action under section 1821(k), where it would have to prove gross negligence, when

it could bring an action under the federal common law and only be required to prove simple negligence?" *Id.*

We are unpersuaded by this argument. Given the RTC's concession that it can only bring federal common law claims against directors and officers of federally chartered institutions and not against their state-chartered counterparts, the answer to the *Miramon* court's question is clear. Concluding that § 1821(k) does not displace federal common law does *not* render this provision "redundant, meaningless surplusage" because the RTC still needs § 1821(k) to bring actions for gross negligence against directors and officers of institutions chartered in states with statutes insulating them from such liability. More particularly, the RTC could *not* bring a federal common law claim of negligence against directors and officers of depository institutions chartered in states with statutes insulating them from liability claims of gross negligence (or worse), since, as the RTC concedes, state law governs the liability of these individuals in the instances where § 1821(k) does not apply. *See Chapman*. 29 F.3d at 1122 (holding that the applicable law governing the liability of officers and directors for their stewardship of the corporation is the law of the jurisdiction where the institution was incorporated or chartered). Accordingly, § 1821(k) is needed to ensure that the RTC is not constrained from seeking recovery for gross negligence in instances where a state insulating statute would apply.

As we have stated, allowing the RTC to bring such actions was *precisely* the purpose underlying the enactment of § 1821(k). When the defendants are directors of federally chartered institutions, such as City Federal, this purpose is not present and the statute simply has no relevance. Permitting the RTC to pursue an action under federal common law when the depository institution is federally chartered in no way renders the statute inoperative; rather such a conclusion merely appropriately limits § 1821(k) to its intended realm.

V. *CONCLUSION*

We hold that Congress did not preempt existing state law or supplant federal common law holding directors and officers liable for conduct less culpable than gross negligence.[17] Accordingly, we will affirm the district court's order in the United Savings action, permitting the RTC to pursue negligence and fiduciary duty claims, if any, under New Jersey law. In the City Federal action, we will reverse the district court's order and direct the court to permit the RTC to pursue any claims for negligence or breach of fiduciary duty available as a matter of federal common law.

[17] As we have noted, in addition to bringing a claim under federal common law in the City Federal action, the RTC has also brought a claim of gross negligence under § 1821(k). Given our conclusion that Congress did not intend § 1821(k) to apply to federally-chartered depository institutions, the RTC *cannot* proceed under § 1821(k) in the City Federal action.

MANSMANN, *Circuit Judge*, concurring in part and dissenting in part.

I concur in the majority's holding that section 1821(k) of the Financial Institutions, Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(k), does not preempt claims for simple negligence or breach of fiduciary duty that may be available to the RTC under state law. I respectfully dissent, however, from Part IV of the opinion, where the majority holds that section 1821(k) does not supplant the RTC's ability to bring such actions under federal common law. I find the majority's conclusion contrary to the statute's language and legislative history. I believe that section 1821(k) establishes a gross negligence standard of liability in suits brought by the RTC against the directors and officers of federally-chartered insured depository institutions, and accordingly would hold, as our sister courts of appeals in the Fifth, Sixth, Seventh and Tenth Circuits have held,[1] that the federal common law standard of simple negligence[2] must yield to section 1821(k)'s higher standard in such cases.

My analysis is guided throughout by the vastly different tests the Supreme Court has instructed us to use when deciding whether a federal statute supplants federal common law on the one hand, or preempts state law on the other. When considering state law preemption, "'we start with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and

[1] *RTC v. Frates*, ___ F.3d ___ (10th Cir. 1995) [1995 U.S. App. LEXIS 7990]; *RTC v. Bates*, 42 F.3d 369 (6th Cir. 1994); *RTC v. Miramon*, 22 F.3d 1357 (5th Cir. 1994); *RTC v. Gallagher*, 10 F.3d 416 (7th Cir. 1993).

[2] The majority does not decide what standard of liability controls under the federal common law. Nevertheless, it strongly suggests in footnote 16 that it is one of ordinary (or simple) negligence and discusses the question before us as if the federal common law would permit the RTC to sue the directors and officers of failed federally chartered insured depository institutions for simple negligence.

manifest purpose of Congress'". *Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981) (citations omitted). By contrast, when the question is whether federal statutory or federal common law governs, "'we start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of law." *Id.* at 317 (footnote omitted). Federal common law is a "'necessary expedient'", resorted to in the absence of a federal statute and is "'subject to the paramount authority of Congress.'" *Id.* at 313-14 (citations omitted). Although a statute will not invade well established principles of common law unless a statutory purpose to the contrary is present, *United States v. Texas*, __ *U.S.* __, 113 S. Ct. 1631, 1634 (1993), when Congress "speak[s] directly" to the question addressed by the common law, federal common law is supplanted. *Id.*; *Milwaukee v. Illinois*, 451 U.S. at 315. Moreover, it is not necessary for Congress to "affirmatively proscribe" the federal common law rule in order to abrogate its application. *Id.*

I.

All questions of statutory interpretation start with the language of the statute itself, and "[a]bsent a clearly expressed legislative intent to the contrary, 'that language must ordinarily be regarded as conclusive.'" *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990), quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Section 1821(k) has two parts: a substantive provision and a savings clause. In the first sentence, section 1821(k) provides that [a] director or officer of an insured depository institution may be held personally liable in any civil action by[ ] . . . the [RTC] . . . for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care . . . as such terms are defined and determined under applicable State law []; and in the second sentence, saves "any right of the [RTC] under other applicable law".[3] Under

[3] Section 1821(k) provides in pertinent part:

(Footnote continued)

FIRREA, "the term 'insured depository institution' means *any* bank or savings association the deposits of which are insured by the [Federal Deposit Insurance] Corporation pursuant to this chapter." 12 U.S.C. § 1813(c)(2) (emphasis added). Thus, that Congress has spoken directly in section 1821 (k)'s substantive provision to the standard of liability for the directors and officers of all failed federally-insured depository institutions, including those with a federal charter is, I believe, not open to question.

I also do not share the majority's confidence in the clarity of the savings clause.[4] Beginning its analysis by inquiring whether any terms of section 1821(k) " 'explicitly preserv[e] or preempt[] judge-made law[]' ", the majority "read[s] the plain meaning of th[e] savings clause as preserving the RTC's right to proceed against directors and officers of federally-chartered institutions under federal common law." Majority Op. at 27. This interpretation of the savings clause, however, has been rejected by our sister courts as contrary to elementary canons of statutory construction. They have concluded

(k) Liability of directors and officers

> A director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by, on behalf of, or at the request or direction of the Corporation, which action is prosecuted wholly or partially for the benefit of the Corporation . . . for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.

12 U.S.C. § 1821(k).

[4] I could not discern the meaning of the savings clause without reference to section 1821(k)'s legislative history. In my view, the savings clause ensures that even though state insulating statutes are preempted, state law which imposes a higher standard than section 1821(k)'s gross negligence liability standard, holding directors and officers liable for simple negligence, remains available to the RTC. *See supra* pp. 9-10.

that if the savings clause were construed to preserve federal common law actions for simple negligence, then the language of the substantive sentence of section 1821(k) which specifically enunciates a cause of action for gross negligence would be meaningless surplusage and rendered a nullity. I agree. *RTC v. Bates,* 42 F.3d 369, 372 (6th Cir. 1994); *RTC v. Miramon,* 22 F.3d 1357, 1361-62 (5th Cir. 1994); *RTC* v. *Gallagher,* 10 F.3d 416, 420 (7th Cir. 1993). *See RTC v. Frates,* __ F.3d __ (10th Cir. 1995) [1995 U.S. App. LEXIS 7990 at 4]. ("[W]e believe *Gallagher, Miramon,* and *Bates* have correctly resolved the [federal common law displacement] issue . . . and we see no reason to depart from or add to the analysis . . . . ").

To avoid this dilemma, the majority informs us that section 1821(k) does *not* address the liability of directors and officers of federally-chartered depository institutions in RTC actions and was enacted only to preempt state insulating statutes. I have difficulty comprehending how section 1821(k) can preserve the RTC's right to sue the directors and officers of federal financial institutions for simple negligence under federal common law, and at the same time, not address the liability of these individuals in RTC actions. The majority cannot have it both ways; either section 1821(k) addresses the issue or it does not.[5]

The majority's position that section 1821(k)'s "intended realm" is limited to state chartered depository institutions,

[5] I would also disagree with the view that the substantive sentence of section 1821(k) speaks only to RTC actions against the directors and officers of state institutions and the savings clause speaks to RTC actions against the directors and officers of both state and federal institutions. Neither the statute's language nor its legislative history indicates that Congress restricted the subject matter of section 1821(k)'s first sentence to state institutions, then expanded it to include state and federal institutions in the second. Further, if section 1821(k)'s substantive provision only concerns state insulating statutes, federal common law need not be "preserved". Finally, other applicable law in the savings clause cannot refer to federal common law if the substantive provision relates only to actions involving state institutions, because federal common law does not have a place in such actions.

Majority Op. at 35, flies in the face of FIRREA's applicable definitional provisions. As noted, section 1821(k) covers directors and officers of "insured depository institution[s]", an all-inclusive term as defined in 21 U.S.C. § 1813(c)(2). Subsections 1813(c)(4) and (5), on the other hand, distinguish between and define respectively "Federal depository institution[s]" and "State depository institution[s]".[6] If section 1821(k) was intended to apply only to state institutions, Congress would have referred in the statute to insured "State depository institution[s]". Indeed, when Congress sought to restrict the application of section 1821's subsections to state institutions, it did so explicitly by using the appropriate term. *E.g.*, 12 U.S.C. § 1821(c)(3)(A) ("Whenever the authority having supervision of any *insured State depository institution* . . . appoints a conservator . . . the Corporation may accept such appointment.") (emphasis added).

Moreover, the majority's position that section 1821(k)'s scope is limited to state institutions is premised on what I believe to be an erroneous interpretation of the statute. The majority states that since "gross negligence" does not have a "generally accepted meaning", Majority Op. at 29, had Congress intended to speak directly to the standard of liability for directors and officers of federally chartered institutions it would have clarified which formulation of gross negligence

[6] Subsections 1813(c)(4) and (5) provide:

(4) Federal depository institution

The term "Federal depository institution" means any national bank, any Federal savings association, and any Federal branch.

(5) State depository institution

The term "State depository institution" means any State bank, any State savings association, and any insured branch which is not a Federal branch.

21 U.S.C. § 1813(c)(4), (5).

applies in such cases.[7] In addition, the majority concludes that a federal statutory gross negligence standard and section 1821(k)'s reference in the first sentence to "applicable State law" cannot co-exist. I do not find them mutually exclusive, and read the statute as directing the courts to define "gross negligence" in cases involving failed federal depository institutions by the state law that has the closest connection to the institution at issue. Congress has, at various times and in various contexts, enacted statutes which rely upon state laws of decision in an overall federal statutes scheme. *In re TMI Litigation Cases Consol. II*, 940 F.2d 832, 855 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992).[8] Concepts of negligence fall squarely within the province of the state courts and the conduct that rises to the level of gross negligence may vary

[7] In making this point, the majority cites *FDIC v. McSweeny*, 976 F.2d 532, 539 (9th Cir. 1992), *cert. denied*, _ *U.S.* _, 113 S. Ct. 2440 (1993), and *FDIC v. Canfield*, 967 F.2d 443, 447 (10th Cir. 1992). In these cases, the courts concluded that section 1821(k) does not preempt state law claims for simple negligence, viewing the statute's reliance on state law for the definition of gross negligence as directly refuting the proposition that FIRREA establishes a uniform, national standard of gross negligence liability. *Id.*

Since its decision in *Canfield* the Court of Appeals for the Tenth Circuit has held that section 1821(k) supplants federal common law. *RTC v. Frates*, _ F.3d _ (10th Cir. 1995) [1995 U.S. App. LEXIS 7990].

[8] Examples of federal statutes that explicitly authorize the use of state law include: the Price-Anderson Amendments Act of 1988, 42 U.S.C. § 2014(hh) (the "substantive rules for decision" in public liability actions "shall be derived from" the law of the state in which the nuclear incident occurs); the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (the law of the place where the act or omission occurred determines the liability of the United States); 16 U.S.C. § 457 (claims for death or personal injury within a federal enclave are governed by laws of the state); the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(2)(A) (the civil and criminal laws of each adjacent state are the law of the United States regarding the Outer Continental Shells subsoil and seabed). At times, the use of state law in a federal scheme is a matter of congressional intent. *See, e.g., Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204 (1946) (Congress intended that state law define "real property" for tax purposes under the Reconstruction Finance Corporation Act.).

from place to place. Thus, a direction from Congress to look for guidance to the law of the locality in which a federally chartered depository institution is based represents a sensible and reasonable way to determine the parameters of the gross negligence liability standard in any given case.

I therefore read the plain meaning of section 1821(k) as "speaking directly" to the standard of liability applicable in suits brought by the RTC against the directors and officers of federally chartered insured depository institutions, and setting it at gross negligence.

II.

When I look for legislative history that contradicts section 1821(k)'s plain meaning as I see it, I find none; and in fact, I find legislative history showing that Congress had before it several competing concerns when enacting section 1821(k) which it resolved in favor of a gross negligence liability standard.

Congress was aware that a number of states had enacted legislation that shields directors and officers from liability except for reckless or willful breaches of duty in order to persuade capable individuals to accept corporate directorships. Finding an intentional tort standard of liability unacceptably high, Congress enacted section 1821(k) with at least the purpose in mind to preempt state insulating statutes. *RTC v. Miramon,* 22 F.3d 1357, 1363 n.9 (5th Cir. 1994). At the same time, however, Congress was not prepared to displace all state law. Thus, the evolution of section 1821(k) from preliminary to final form was toward less preemption, *FDIC v. McSweeny,* 976 F.2d 532, 540 (9th Cir. 1992), *cert. denied,* __ U.S. __, 113 S.Ct. 2440 (1993), with Congress ultimately leaving it, through the savings clause, to each state to decide whether a simple negligence standard is appropriate within its own borders.[9]

[9] During the floor debate in the Senate on the managers' amendment to the Senate's original bill, Senator Riegle, the bill's sponsor, explained that the amended bill sought to limit the preemptive scope of section 1821(k) to state insulating statutes. *See* Majority Op. at 17-18.

While Congress sought to set a standard of liability in section 1821(k) that provided federal regulators with adequate enforcement power, Pub.L. No. 101-73, § 101(9)-(10), 103 Stat. 183, 187 (1989), it also understood the importance of attracting qualified persons to serve as officers and directors of financial institutions.[10] *RTC v. Gallagher,* 10 F.3d 416, 422 (7th Cir. 1993). Accordingly, the standard of liability to be included in the statute — simple or gross negligence—was a matter of debate. While the Senate's initial bill would have allowed the RTC to bring claims "for any cause of action

[10] The remarks of Senator Sanford during the floor debate on the managers' amendment indicate that Congress was concerned that financial institutions be able to attract competent management:

> Mr. President, I would like to thank the distinguished managers of the bill. Senator RIEGLE and Senator GARN, for including in the managers' amendment modifications to the bill regarding directors and officers liability insurance contracts, surety bond, and financial institution bond contracts, and provisions relating to State laws affecting the liability of officers and directors of financial institutions.
>
> I believe that these changes are essential if we are to attract qualified officers and directors to serve in our financial institutions.

135 Cong.Rec. S4276-77 (daily ed. April 19, 1989).

During this same debate, Senator Heflin noted the need for changes in the Senate bill to "ensure that financial institutions are able to attract strong and capable individuals as directors and officers []", and Senator Riegle agreed. *Id.* at S4264-65. Although Senator Heflin's comments were made in connection with modifications to FIRREA's "standard for imposition of civil penalties" provision, now codified at 21 U.S.C. § 1818(i)(2), I, unlike the majority, believe that the Senator's statements further our understanding of section 1821(k). The Supreme Court has counseled that the true meaning of a single section of a statute . . . , however precise its language, cannot be ascertained if it be considered apart from related sections . . . .'" *Commissioner v. Engle,* 464 U.S. 206, 223 (1984), *quoting Helvering v. Morgan's, Inc.,* 293 U.S. 121, 126 (1934). *See also Richards v. United States,* 369 U.S. 1, 11 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act ....").

available at common law, including but not limited to, negligence, gross negligence, willful misconduct, breach of fiduciary duty ....", S.774, § 214(n), 101st Cong., 1st Sess. at 105-106 (calendar N. 45, April 13, 1989), its amended version removed, *inter alia,* all references to a simple negligence standard:

> [A director or officer of an insured financial institution may be held personally liable for gross negligence, or intentional conduct, as those terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right, if any, of the [FDIC] that may have existed immediately prior to the enactment of the [FIRREA] Act.

135 Cong.Rec. S4452 (daily ed. April 19, 1989).[11]

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[11] The majority relies exclusively on the following Senate Report as demonstrative of Congress' intent to "explicitly preserve [] any federal remedy for conduct violating a lower standard of care, such as simple negligence []", Majority Op. at 28:

> [Section 1821(k)] enables the FDIC to pursue claims against directors or officers of insured financial institutions for gross negligence (or negligent conduct that demonstrates a greater disregard of a duty of care than gross negligence) or for intentional tortious conduct. This right supersedes State law limitations that, if applicable, would bar or impede such claims. this subsection [] does not prevent the FDIC from pursuing claims under State law or under other applicable Federal Law, if such law permits the officers or directors of a financial institution to be sued (1) for violating a lower standard of care, such as simple negligence, or (2) on an alternative theory such as breach of contract or breach of fiduciary duty ....

S.Rep. No. 19, 101st Cong., 1st Sess., 135 Cong.Rec. 6912 (daily ed. June 19, 1989).

If this were the only item of legislative history before us, I would find the majority's position more persuasive. When I consider the Report in context, however, I do not believe it supports the majority's position. The Report was prepared by the Senate Banking Committee that drafted the

(Footnote continued)

Commenting in favor of the amended bill, Senator Sanford unmistakenly articulated Congress' intent to establish a standard of liability of gross negligence in section 1821(k) and clarified that the standard Congress enacted for actions brought under the statute was not intended for other cases:

> While I fundamentally believe that issues of corporate governance and the standard of care to which corporate officers and directors should be held are matters of State law, not Fed[e]ral law, the preemption of State law permitted by this bill is limited solely to those institutions that have Federal deposit insurance and to those cases in which the directors of officers have committed intentional torts or acts of gross negligence. As such, the establishment of a federal standard of care is based on the overriding Federal interest in protecting the soundness of the Federal Deposit Insurance Corporation fund and is very limited in scope. It is not a wholesale preemption of longstanding principles of corporate governance, nor does it represent a major step in the direction of establishing Federal tort standards or Federal standards of care of corporate officers and directors.

Id. at S4264-65.[12]

Senate's original bill. Due to the press of time, it was not placed in the Congressional Record until two months after the Senate voted on and passed the amended bill. *Id.* at S6934. As noted, the original bill was modified substantially to delete references to simple negligence. I therefore question the Report's value. *RTE v. Miramon,* 22 F.3d 1357, 1362 (5th Cir. 1994) ("[E]xamination of all of the legislative history, and scrutiny of the sequence of events leading up to the bill's passage, calls into question the conclusion of th[e] report.").

[12] The majority also points to Senator Sanford's comments for support. While the Senator's comments certainly demonstrate that section 1821(k) was not intended to set a universal standard of director and officer liability, I do not believe they support the view that Congress did not address the standard of liability to be used in this RTC action.

(Footnote continued)

The House version of section 1821(k), passed after the Senate version, H.R. 1278, 101st Cong., 1st Sess., 135 Cong.Rec. H2602 (daily ed. June 15, 1989), and the version that was ultimately voted into law, preserved the Senate's removal of the simple negligence standard. *See* Pub.L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989), *reprinted in* 1989 U.S.C.C.A.N. 86. The House-Senate Conference Report which represents the final statement of terms agreed upon by both Houses of Congress confirms that Congress decided upon a gross negligence standard for section 1821(k):

> Title II preempts State law with respect to claims brought by the FDIC in any capacity against officers or directors of an insured depository institution. The preemption allows the FDIC to pursue claims for gross negligence or any conduct that demonstrates a greater disregard of a duty of care, including intentional tortious conduct.

H.R.Conf.Rep. No. 222, 101st Cong. 1st Sess. 393, 398 (1989), *reprinted in* 1989 U.S.C.C.A.N. 432, 437.

Events which occurred after the statute's enactment also confirm that Congress established a standard of liability greater than simple negligence in section 1821(k). I recognize that post-enactment legislative history is not as weighty as legislative history that is contemporaneous with a statute's passage, but as the Supreme Court has instructed, I would "be remiss" to ignore it. *Cannon v. University of Chicago,* 441 U.S. 677, 687 n. 7 (1979). There were two unsuccessful

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Further, I believe the Senator's comments cast doubt on the majority's statement that "[e]ven assuming that the proper characterization of preexisting federal common law standard (as one of negligence or gross negligence) is unclear, it seems quite unlikely that Congress would have intended to reformulate the post-receivership standard as gross negligence, while leaving the pre-receivership standard in a state of ambiguity." Majority Op. at 30. It appears that when enacting section 1821(k), Congress did not focus on the duty of care that directors and officers of financial institutions may owe their shareholders or third parties in pre-receivership situations or on duties of care in other areas.

efforts to amend section 1821(k) to include a simple negligence standard of liability, one by the FDIC,[13] and the other by Congressman Baker of Louisiana.[14] *Gallagher,* 10 F.3d at 423. Only the presence of a gross negligence standard in section 1821(k) would have precipitated these attempts to reintroduce simple negligence as a standard in the statute. Further, had Congress preserved the federal common law standard in section 1821(k), as the majority contends, these amendments would not have been necessary.

Finally, the public policy consideration the majority raises regarding the "perverse incentive" that would be created if the pre-receivership liability standard is simple negligence and the post-receivership standard is higher, Majority Op. at 30, may be more imagined than real. I have no reason to believe that the directors and officers of federal depository institutions will allow their institutions to fail in order to take advantage of section 1821(k)'s gross negligence standard. If, however, the statute has this result, it flows from the statute as written, which is for Congress to correct. *FMC Corp. v. U.S. Dep't of Commerce,* 29 F.3d 833, 846 (3d Cir. 1994) (declining to amend CERCLA by "judicial fiat").

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[13] The FDIC amendment provided:

> Nothing in this subsection shall impair or affect any right of the [RTC] under other applicable State or Federal law, including a right to hold such director or officer personally liable for negligence.

Miramon, 27 F.3d at 1363 n.10.

[14] The Baker amendment provided:

> Paragraph (1) shall not be construed as impairing or affecting any right of the . . . [RTC] under any provision of applicable State or other Federal law, including any provision of common law or any law establishing the personal liability of any director or officer of an insured depository institution under any standard pursuant to such law.

H.R. 3435, 102nd Cong., 1st Sess. § 228 (Comm. Markup Oct. 18, 1991).

III.

In my judgment, the only reading of section 1821(k) consistent with its plain meaning and its legislative history is that the statute "speaks directly" to the standard of liability applicable to the directors and officers of state and federal federally-insured depository institutions in RTC actions. I must, therefore, conclude that the federal common law in this area is supplanted. *Milwaukee v. Illinois,* 451 U.S. 304, 313-16 (1984).

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-5307

RESOLUTION TRUST CORPORATION, in its capacity as receiver for CITY SAVINGS, F.S.B., and the RESOLUTION TRUST CORPORATION, in its corporate capacity

v.

CITYFED FINANCIAL CORP.; RICHARD E. SIMMONS; K. MICHAEL DEFREYTAS; JOHN W. ATHERTON, JR.; GORDON E. ALLEN; ALFRED J. HEDDEN; PETER R. KELLOGG; JOHN KEAN, JR.; GILBERT G ROESSNER; GEORGE E. MIKULA; JAMES P. MCTERNAN; VICTOR A. PELSON; MARSHALL M. CRISER

(Trenton New Jersey District Civil No. 92-cv-05261)

RESOLUTION TRUST CORPORATION, in its capacity as receiver for CITY SAVINGS, F.S.B.

v.

JOHN W. ATHERTON, JR.; GORDON E. ALLEN; ALFRED J. HEDDEN; PETER R. KELLOGG; JOHN KEAN, JR.; GILBERT G. ROESSNER; JAMES P. MCTERNAN

(Trenton New Jersey District Civil No. 93-cv-01811)

Resolution Trust Corporation, in its capacity
as Receiver for City Savings, F.S.B.,
Appellant in No. 94-5307

NO. 94-5308

RESOLUTION TRUST CORPORATION

v.

ALFRED J. SCHUSTER; THOMAS J. LYNAM; MARTIN R. SIEGEL; RICHARD P. PEARLMAN; JOAN C. MOONAN, individually and as Executrix of the Estate of Robert J. Moonan; EUGENE J. ELIAS; GEORGE HURLEY; WILLIAM B BRICK; JAMES W. DWYER; HARRY H. JAEGER; JOHN R. HIPPLE; JOHN C. LAURICELLA; LOUIS A. IATAROLA

(New Jersey District Civ. No. 93-cv-02560)

Martin R. Siegel, and Joan C. Moonan, as Executrix of the Estate of Robert J. Moonan and individually, Appellants in No. 94-5308

On Appeal From the United States District Court
For the District of New Jersey
D.C. Civ. Nos. 92-cv-05261, 93-cv-01811, 93-cv-02569

Present: Becker, Mansmann, and Alito,

JUDGMENT

These causes came to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel November 8, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court entered in No. 92-CV-05261 and certified to this Court pursuant to 28 U.S.C. § 1292(b), be, and the same is hereby reversed and the cause is remanded with direction to permit the Resolution Trust Corporation to pursue any claims for

negligence or breach of fiduciary duty available as a matter of federal common law.

It is further ordered and adjudged the order of the said District Court entered in Nos. 92-CV-02569 and 93-CV-01811 and certified to this Court pursuant to 28 U.S.C. § 1292(b), be and the same is affirmed insofar as the Resolution Trust Corporation was permitted to pursue negligence and fiduciary duty claims, if any, under New Jersey law.

Costs taxed against the appellee in appeal No. 94-5307 and the appellant in appeal No. 93-5308. All of the above in accordance with the opinion of this Court.

ATTEST

/s/

Chief Deputy Clerk

Dated: June 23, 1995

Certified as a true copy and issued in lieu
of a formal mandate on September 22, 1995.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-5307

RESOLUTION TRUST CORPORATION, in its capacity as receiver for CITY SAVINGS, F.S.B., and the RESOLUTION TRUST CORPORATION, in its corporate capacity

v.

CITYFED FINANCIAL CORP.; RICHARD E. SIMMONS; K. MICHAEL DEFREYTAS; JOHN W. ATHERTON, JR.; GORDON E. ALLEN; ALFRED J. HEDDEN; PETER R. KELLOGG; JOHN KEAN, JR.; GILBERT G. ROESSNER; GEORGE E. MIKULA; JAMES P. McTERNAN; VICTOR A. PELSON; MARSHALL M. CRISER

(Trenton New Jersey District Civil No. 92-cv-05261)

RESOLUTION TRUST CORPORATION, in its capacity as receiver for CITY SAVINGS, F.S.B.

v.

JOHN W. ATHERTON, JR.; GORDON E. ALLEN; ALFRED J. HEDDEN; PETER R. KELLOGG; JOHN KEAN, JR.; GILBERT G. ROESSNER; JAMES P. MCTERNAN

(Trenton New Jersey District Civil No. 93-cv-01811)

Resolution Trust Corporation, in its capacity as Receiver for City Savings, F.S.B., Appellant in No. 94-5307

NO. 94-5308

RESOLUTION TRUST CORPORATION

v.

ALFRED J. SCHUSTER; THOMAS J. LYNAM; MARTIN R. SIEGEL; RICHARD P. PEARLMAN; JOAN C. MOONAN, individually and as Executrix of the Estate of Robert J. Moonan; EUGENE J. ELIAS; GEORGE HURLEY; WILLIAM B. BRICK; JAMES W. DWYER; HARRY H. JAEGER; JOHN R. HIPPLE; JOHN C. LAURICELLA; LOUIS A. IATAROLA

(New Jersey District Civ. No. 93-cv-02560)

Martin R. Siegel, and Joan C. Moonan, as Executrix of the Estate of Robert J. Moonan and individually, Appellants in No. 94-5308

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, UTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and SAROKIN, *Circuit Judges*

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellees having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the

circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

Judge Mansmann would grant rehearing in this case.

BY THE COURT:

/s/__________________________
Circuit Judge

DATED: SEPT. 14, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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RTC, et al.,	:	
Plaintiffs,	:	No. CV92-5261
against -	:	402 East State Street Trenton, NJ 08608
ATHERTON, et al.,	:	November 15, 1993
Defendants.	:	

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TRANSCRIPT OF CIVIL HEARING
BEFORE HONORABLE GARRETT E. BROWN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For RTC:	Riker, Danzig, Scherer, Hyland & Perretti BY: GLEN CURVING, ESQUIRE BY: CHARLES WEISS, ESQUIRE Headquarters Plaza 1 Morristown, NJ 07962
For Atherton, Hedden and Rosner:	Kirkpatrick & Lockhart BY: RONALD STEVENS, ESQUIRE BY: BRUCE NIELSON, ESQUIRE BY: HUNT DUMONT, ESQUIRE 1800 M. Street, N.W. South Lobby, 9th Floor Washington, D.C. 20036

For Allen, Pelson and Kellogg:	Skadden, Arps, Slate, Meagher & Flom BY: DOUGLAS KRAUSE, ESQUIRE Saiber, Schlesinger, Satz, & Goldstein BY: BRUCE GOLDSTEIN, ESQUIRE
For John Kean:	Venable, Baetjer, Howard & Civiletti BY: WILLIAM COSTON, ESQUIRE BY: RONALD GLANCZ, ESQUIRE Orloff, Lowenbach, Stifelman & Siegel BY: LAURA VALENTI STUDWELL, ESQUIRE

* * *

THE COURT: The defendants move to dismiss the plaintiffs' first amended complaint under Rule 12b6. After a thorough review of the record, I am constrained to grant the defendants' motion to dismiss with respect to all issues raised in the first amended complaint except for the allegation of gross negligence.

Now as to the question of whether or not more specific pleading is required, based upon the federal rules, I am constrained to say that it is not -- while it might be desirable and while I'm sure prompt discovery and motion practice may cure any deficiencies from an over-broad complaint, I do not think that that portion of the defendants' motion can be granted.

Now in ruling I think I have to first summarize this litigation a little bit. The Resolution Trust Corporation, created by the Congress in FIRREA, the Financial Institution Reform

Recovery Enforcement Act of 1989, in its capacity as receiver for City Savings, F.S.B., a successor to -- City Federal Savings Bank, asserts a cause of action against its former City Federal directors, officers, employees, including Atherton, Allen, Kellogg, Pelson, Kean, Hedden, Rosner, Criser, McCullough and McDerney (phonetic spellings).

The RTC asserts that the defendants were negligent, grossly negligence, and breached their fiduciary duties when approving certain large commercial loans which ultimately contributed to the failure of City Federal.

The history of City Federal as alleged in the complaint has been discussed in prior opinions. Briefly summarized, City Federal, with its principal place of business in Bedminister, New Jersey, was originally organized in 1887 a New Jersey chartered mutual savings and loan association. In 1949, it acquired a federal savings and loan charter from Federal Home Loan Bank Board.

In June of 1980, City Federal converted to a federally chartered stock savings and loan association. In 1984, City Federal's corporate structure was reorganized to create a unitary savings and loan company known as CitiFed Financial Corporation which acquired the stock of City Federal, which became a wholly owned subsidiary of CitiFed and changed its charter to that of a federal savings bank and so operated until its closure in December 1989.

In 1983, City Federal acquired 98 percent of the outstanding stock of Home Federal Savings and Loan, Palm Beach Florida. Later that year the Florida bank was merged into City Federal and following the merger, City Federal became increasingly involved in the funding of large commercial real estate projects in Florida. Two of these loans, Grand Harbor Project and Woodfield Country Club Estates project resulted in losses exceeding 130 million dollars.

Moving on to December 7, 1989, the Office of Thrift Supervision declared City Federal insolvent or closed and placed into receivership. The RTC was appointed as receiver for City

Federal, succeeded to all rights, titles, powers, and privileges of City Federal, its Board of Directors, shareholders and depositors.

An then on December 8th of 1989, pursuant to purchase of the assumption agreement, a newly formed federal savings bank, City Savings Bank, F.S.B., purchased all of the RTC's rights, title, and interest and any claim, action or judgment against any of City Federal's' directors, officers, accountants attorneys or employees whose actions may have been related to the substantial losses incurred by City Federal. OTS placed City Federal -- or City Savings, rather, into conservatorship and appointed the RTC as conservator.

September 21, 1990, the OTS closed City Savings and appointed the RTC as receiver. On that day, pursuant to a purchase and assumption agreement, a newly formed federal savings bank, City Savings Bank, F.S.B., purchased all the RTC's rights, title, and interest in any action, claim, or judgment against the directors, officers, or accountants, attorneys or employees whose actions may have been related to the substantial losses incurred by City Federal. OTS thereafter placed City into conservatorship and appointed the RTC as conservator. January 11, 1991, OTS closed City and appointed the RTC as receiver.

So that's how we come to the present juncture, where the RTC brings this action against the directors, officers, and employees of City Federal who have moved, as I said, for an order dismissing the complaint pursuant to Rule 12b6.

In order to grant that motion, I would have to accept all well-pleaded allegations as true and view them in a light most favorable to the plaintiff and determine that the plaintiff is nonetheless not entitled to relief. The complaint can't be dismissed unless the plaintiff can prove no set of facts entitling him to relief. The issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the complaint.

In setting forth a valid claim, a party is required only to plead a short, plain statement of the claim, showing the pleader is entitled to relief. That's Rule 8a, and that is the basis for the second prong of my ruling, that no greater specificity concerning the defendants is required. While one might desire it, Rule 8a does not require it.

Now from the abbreviated statement of facts that I just reviewed, which are set forth in greater detail in the first amended complaint, it's clear that City Federal was a federally chartered and federally insured savings and loan association since 1949. A federally chartered savings and loan association is entirely a creation of federal law. Numerous cases have held that federal law has preempted state law with respect to the internal operations of federally chartered savings and loan associations and indeed the RTC concedes that federal and not state law applies. See also *Mortonson versus First Federal Savings and Loan Association*, 79 FRD. 603, District of New Jersey, 1978; *Resolution Trust Corporation versus Hess*, 820 Fed. Sup. 1359, District of Utah, 1993. But it is clear and not argued to the contrary that federal law, not state law, governs the internal affairs of federal savings and loan associations, including director liability.

We move on to the next issue. What is the applicable federal law dealing with the liability of banking directors and officers? To do that, we have to consider 12 U.S. Code 1821K, a section of FIRREA. Parties disagree as to the scope and application of that section, which specifically contemplates the liability of bank directors and officers. It states in pertinent part:

"A director or officer of an insured depository institution may be held personally liable for monetary damages and any civil action by, or on behalf of, or at the request or direction of the RTC which action is prosecuted wholly or partially for benefit of the RTC acting as conservator or receiver of such institution for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care, then gross negligence, including intentional tortious

conduct as such terms are defined and determined under applicable state law. Nothing in this paragraph shall impair or affect the rights of the RTC under other applicable law."

Now with certain bracketed additions, that is the provision we're talking about. Now the RTC asserts that 1821K doesn't establish a national gross negligence standard of care for directors and officers or federally chartered financial institutions and argues that the last line of Section K, which is commonly referred to as a savings clause, preserves the RTC's right to sue directors and officers under ordinary state negligence law.

Defendants argue that 1821K does establish gross negligence as the exclusive standard of liability for director and officers of federally chartered savings institutions. I find the defendants' position persuasive.

There are three distinct interpretations of 1821K. Some courts have established that the section doesn't preempt either federal or state common law as the standard of liability for officers, directors. Some Courts have taken the view that it preempts both state and federal and some Courts have adopted a middle ground, ruling that 1821K preempts federal common law but not state law.

Now since we're dealing solely with federal common law, we really don't have to consider the questions of state common law, and in reaching our determination, I think that the *Gallagher* case cited by the defense, 1993, West Law, 157 672 7th Circuit, November 9, 1993, is a very persuasive one. I think that the analysis that is set forth is persuasive indeed as far as the *Canfield* and *McSweeney* cases cited by the plaintiff, Footnote 3 does indeed state: "Two circuits have considered the related issue of whether Section 1821K preempts state law. Both Courts have determined that it does," citing *Canfield* and *McSweeney*. "We hold there any reference," it says, "that 1821K does not preempt federal common law is mere dicta, based upon the holding," and I don't think that we need to rely on mere dicta where we have clear holding and, more importantly, the clear language of the statute here which supports the defendants' position.

In *FDIC versus Mince* (phonetic), 816 Fed. Sup. 1541, Southern District of Florida, 1993, the Court found that 1821K did indeed preempt federal common law. In *Mince*, the District Court stated that "The federal common law standard of simple negligence -- "which I would note parenthetically is not clear that federal common law beforehand was simple negligence, but I don't need to reach that issue since I can clearly find preemption here. But in *Mince*, the District Court said, "The federal common law standard of simple negligence is preempted by 1821K. Well conceding that reasonable minds may differ as to the construction of the statute, the finding of federal common law is preempted as required. The reading of the savings clause to include federal common law makes the rest of the statute a nullity.

Accordingly, the Court finds that federal common law is preempted and is not included in the other applicable law language found in the savings clause. Any other interpretation of the savings clause eviscerates the gross negligence standard completely. The Court refuses to interpret the savings clause as a way which destroys the meaning of the rest of the statute."

Going further, the Court said, "If Congress had intended to set a uniform national standard as to state law, it could have done so more clearly." We need not reach that here because we're not dealing with a preemption of state law, but I think it's persuasive that federal common law is clearly preempted.

In *RTC versus Farmer*, 823 Fed. Sup. 302 307, Eastern District of Pennsylvania, 1993, the Court again differentiated between federal and state chartered financial institutions and agreeing with the *Mince* rationale, held that prior federal common law was preempted and the Court did not reach the issue of whether state liability standards allowing a claim for simple negligence in a non-federally chartered bank were preempted. We don't need to reach that issue here either.

It's clear to this Court that 1821K preempts federal common law by establishing a federal gross negligence liability standard for banking directors and officers of federally

chartered banks. The section is clear and unambiguous on its face. If the Congress had desired a different result, it would have drafted the section accordingly.

Therefore, the RTC's state law negligence claims are withdrawn, according to the RTC, and the claims under federal common law, to the extent that they go to a lesser standard than gross negligence, are clearly preempted, and I will therefore grant the defendants' motions and require the plaintiff to re-plead within twenty days.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RESOLUTION TRUST CORPORATION, in its capacity as Receiver for CITY SAVINGS, F.S.B.,	:	Civ. No. 92-5261 (GEB)
Plaintiff,	:	**MEMORANDUM AND ORDER**
v.	:	
JOHN W. ATHERTON, JR.; et al.,	:	
Defendants.	:	

BROWN, District Judge

This matter comes before the Court on plaintiff Resolution Trust Corporation's motion pursuant to 28 U.S.C. § 1292(b), to certify this Court's November 15, 1993 orders which granted defendants' motions to dismiss plaintiff's first amended complaint to the extent that the complaint asserted claims other than gross negligence. For the foregoing reasons, the Court will grant plaintiff's motion for certification.

I. BACKGROUND

This Court adequately set forth the factual background of this matter in the November 15, 1993 ruling from the bench. Accordingly, this Court finds no reason to reiterate the facts of this case.

II. DISCUSSION

On November 15, 1993, this Court adopted the reasoning set forth in *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416

(7th Cir. 1993), and held that the Financial Institutions Reform, Recovery and Enforcement Act "[section] 1821(k) preempts federal common law by establishing a federal gross negligence liability standard for banking directors and officers of federally chartered banks." *See* November 15, 1993 Hearing Transcript at 28-31. Relying on *FDIC v. McSweeney*, 976 F.2d 532 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2240 (1993) and *FDIC v. Canfield*, 967 F.2d 443 (10th Cir.)(en banc), *cert. dismissed*, 113 S. Ct. 516 (1992), plaintiff Resolution Trust Corporation asserts that section 1821(k) does not preempt federal common law by establishing a federal gross negligence standard. Accordingly, plaintiff moves, pursuant to 28 U.S.C. § 1292(b), to have this Court certify its November 15, 1993 orders so that plaintiff may seek an interlocutory appeal to the Third Circuit.

28 U.S.C. § 1292(b) provides that a district court judge may certify an order for interlocutory appeal only if the judge is "of the opinion that such order involves (1) a controlling question of law (2) as to which there is substantial ground for difference of opinion and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* After reviewing the submissions of the parties and the November 15, 1993 transcript, this Court finds that the federal gross negligence liability standard is a controlling question of law as to which there is a substantial ground for difference of opinion. *Compare Resolution Trust Corp. v. Gallagher*, 10 F.3d 416 (7th Cir. 1993) with *FDIC v. McSweeney*, 976 F.2d 532 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2240 (1993) and *FDIC v. Canfield*, 967 F.2d 443 (10th Cir.)(en banc), *cert. dismissed*, 113 S. Ct. 516 (1992). Moreover, this Court determines that an immediate interlocutory appeal to the Third Circuit, which could potentially resolve this legal issue, would materially advance the present litigation. Accordingly, this Court will grant plaintiff's motion for certification pursuant to 28 U.S.C. § 1292(b).

III. CONCLUSION

For the foregoing reasons,

It is this 11th day of March, 1994,

ORDERED that defendant Resolution Trust Corporation's 28 U.S.C. § 1292(b) motion for certification of this Court's November 15, 1993 orders be and is hereby GRANTED.

/s/

GARRETT E. BROWN, JR., U.S.D.J.

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

April 5, 1994
B-107

No. 94-8015

RESOLUTION TRUST CORPORATION, Petitioner

v.

RICHARD E. SIMMONS, et al.

(N.J. (Trenton) D.C. Civil Nos. 92-cv-05261
& 93-cv-01811 (GEB))

Present: STAPLETON, COWEN and LEWIS, *Circuit Judge*.

Petition for Permission to Appeal pursuant to 28 U.S.C. Section 1292(b).

/s/

Anthony Infante 597-3137
Deputy Clerk

ORDER

The foregoing petition for permission to appeal is granted.

By the Court,

/s/

Circuit Judge

Dated: May 18, 1994

(2)

No. 95-928

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHN W. ATHERTON, JR., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR CITY SAVINGS, F.S.B.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 212(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. 1821(k), displaced the FDIC's right, as receiver, to assert a failed depository institution's own federal common law claims against its former officers or directors.

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In the Supreme Court of the United States

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No. 95-928

JOHN W. ATHERTON, JR., ET AL., PETITIONERS

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AS RECEIVER FOR CITY SAVINGS, F.S.B.

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*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A50) is reported at 57 F.3d 1231. The opinion of the district court (Pet. App. A65-A67) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1995. A petition for rehearing was denied on September 14, 1995. Pet. App. A54-A56. The petition for a writ of certiorari was filed on December 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. City Federal Savings Bank (City Fed) was a federally chartered, federally insured savings bank located in Bedminster, New Jersey. On December 7, 1989, the Director of the Office of Thrift Supervision (OTS) declared City Fed insolvent and appointed the Resolution Trust Corporation (RTC) as its receiver. Under 12 U.S.C. 1821(d)(2)(A), the RTC succeeded to all of City Fed's rights, titles, powers, and privileges, including any ci[illegible] damage claims that the institution may have had against its own former directors and officers.[1] Through a series of transactions, City Fed's assets were transferred to a newly chartered federal savings bank, City Savings, F.S.B, which, on January 11, 1991, was itself placed into an RTC receivership.

In its capacity as receiver for City Savings, the RTC filed suit against several of City Fed's former directors and officers (including petitioners), alleging breach of fiduciary duty, negligence and gross negligence under state law and federal common law. The RTC claimed that the defendants failed to exercise appropriate care in their consideration, approval, and oversight of several large acquisition, development, and construction loans, which ultimately defaulted,

[1] The RTC had the same powers and rights to carry out its functions as the Federal Deposit Insurance Corporation (FDIC) has under Sections 1821, 1822, and 1823 of Title 12. 12 U.S.C. 1441a(b)(4)(A). On December 31, 1995, the RTC terminated, in accordance with the provisions of the Resolution Trust Corporation Completion Act, 12 U.S.C. 1441a(m)(1). The RTC was succeeded in its capacity as receiver by the FDIC. 12 U.S.C. 1441a(b)(4)(A).

resulting in losses to City Fed of more than $100 million. Pet. App. A11.

The district court granted petitioners' motion to dismiss. Pet. App. A57-A64. The parties agreed that, because City Fed was a federally chartered institution, federal law governed its internal affairs and supplied the standards that governed its officers' and directors' liability. *Id.* at A61. The court concluded that Section 212(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. 1821(k), which authorizes suit by the federal receiver for gross negligence, provides a uniform standard of liability that governs all claims brought by the RTC against former directors or officers of federally chartered depository institutions. Pet. App. A61-A64.[2] The court, however, granted the RTC's motion to certify its order of dismissal for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. A66.[3]

The court of appeals granted the petition for interlocutory review, Pet. App. A68, and consolidated the

[2] Section 1821(k) provides in relevant part as follows:

> A director or officer of an insured depository institution may be held personally liable for monetary damages * * * for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.

[3] At the same time, the court permitted the RTC to file an amended complaint adding statutory claims of gross negligence under Section 1821(k) to the federal common law claims made in the original complaint.

RTC's appeal with an appeal filed by the defendants in an unrelated suit brought by the RTC as receiver for United Savings and Loan of Trenton, New Jersey (United Savings). United Savings had been a state-chartered institution, and the negligence and breach of fiduciary duty claims asserted by the RTC against United Savings' former officers and directors were therefore based on New Jersey law. *Id.* at A9-A10. The district court in the *United Savings* case had rejected the defendants' motion to dismiss the RTC's state law claims as preempted by Section 1821(k), but had also certified its order for interlocutory appeal. *Id.* at A10.

2. The court of appeals (i) reversed the district court's dismissal of the RTC's federal common law negligence and breach of fiduciary duty claims against the City Fed officers and directors, and (ii) affirmed the district court's refusal to dismiss the RTC's state law claims against the United Savings defendants. Pet. App. A1-A37. It rejected the contention that Congress intended Section 1821(k) to constitute the exclusive standard governing officer and director liability, concluding instead that Section 1821(k) functions as a floor, ensuring the federal receiver's ability, irrespective of the law of the chartering authority, to recover for damages caused by the gross negligence (or even more culpable conduct) of officers or directors of federally insured institutions.

a. Looking first to the statutory text, the court concluded that the last sentence of Section 1821(k) (the savings clause) preserves the federal receiver's ability to seek recovery under "*all* 'other applicable law,' including the less forgiving negligence and fiduciary duty standards of care under state law and federal common law." Pet. App. A13. The court rejected the defendants' suggestion that "other applicable law" refers only to the federal receiver's right to pursue administrative remedies under FIRREA, noting that when Congress intended elsewhere in FIRREA to limit its reference "to the law of a particular jurisdiction * * *, it did so with *specific* language." *Id.* at A14. The limited scope of Section 1821(k)'s substantive provision (*i.e.*, authorizing suits for gross negligence whether or not they were authorized by other laws) was, in the court's view, consistent with Congress's modest goal (as revealed by the legislative history) merely "to ensure that directors and officers of state-chartered institutions * * * not escape liability to the RTC under the shield of certain state laws that had effectively insulated them from claims based on their grossly negligent or reckless conduct." *Id.* at A23.

Turning to the question presented by the *United Savings* case, the court concluded that Section 1821(k) preempts only those state laws that would otherwise insulate officers and directors of state-chartered institutions from civil liability for gross negligence or other more culpable conduct. Pet. App. A24-A27. In the court's view, "Congress did not intend to hinder the RTC by denying it an opportunity to recover for instances of director and officer negligence when shareholders of these institutions would have had a right under state law before receivership, to bring such an action on behalf of the corporation." *Id.* at A27.

The court similarly held that Section 1821(k) does not displace the federal receiver's ability to bring suit against former officers or directors of federally chartered institutions under existing federal common

law. Pet. App. A27-A36. The court noted that, upon the receivership, the RTC obtained the rights that City Fed had itself possessed, which (petitioners conceded) included the right to bring an action against its officers and directors under federal common law. *Id.* at A28.[4] The savings clause, in the court's view, secured the RTC's rights (in that regard. *Ibid.* The court held that Congress intended through Section 1821(k) to "address the question of what standard should apply in cases where the RTC was confronted with an applicable state insulating statute, * * * *not* * * * to define the standard of care applicable to federally chartered institutions governed by federal common law." *Id.* at A30.

The court did not decide "whether the federal common law standard is one of ordinary or gross negligence." Pet. App. A32 n.16. Rather, it directed the district court on remand "to permit the RTC to pursue any claims for negligence or breach of fiduciary duty available as a matter of federal common law." *Id.* at A37.[5]

Judge Mansmann concurred in part and dissented in part. Pet. App. A38-A50. She agreed with the majority that Section 1821(k)'s authorization of suits for gross negligence does not bar the federal receiver, in suits against officers or directors of state-chartered

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[4] The court's analysis was premised on its understanding that "federal law exclusively governs [cases involving the liability of directors and officers] * * * when the institution is federally chartered, like City Federal." Pet. App. A10 n.5.

[5] In light of its view that Section 1821(k) does not govern suits by the federal receiver against officers or directors of federally chartered depository institutions, the court of appeals held that the RTC could not proceed with its claims for gross negligence under Section 1821(k). Pet. App. A37 n.17.

institutions, from asserting state law claims sounding in ordinary negligence or breach of fiduciary duty. *Id.* at A38. In her view, however, Section 1821(k) "spoke directly" to the issue of what standard of liability ought to be applied in suits by the federal receiver against officers or directors of federally chartered institutions and thereby precluded the application of any different standard based on federal common law. *Id.* at A50.

ARGUMENT

Petitioners contend that the court of appeals erred in holding that 12 U.S.C. 1821(k) does not supersede the federal receiver's ability to sue officers and directors of a failed federally chartered depository institution under federal common law, and they assert that the Court should grant certiorari in this case to resolve the conflict among the courts of appeals on that issue. In our view, the court of appeals' decision was correct, and is consistent with both the plain language of the statute and its legislative history. Although some circuits would have decided the issue of whether Section 1821(k) supersedes federal common law differently, it is not yet clear whether the difference between the Third Circuit and other circuits on that issue has any practical significance. The court of appeals remanded the case to the district court to decide what standard of liability governs under federal common law. If the lower courts ultimately conclude (as petitioners urge) that the standard to be applied under the federal common law is the same as the standard authorized by Section 1821(k) (gross negligence), the court of appeals' holding in this case will have no appreciable effect on petitioners or future defendants. Accordingly, the

issue resolved by the decision below does not warrant review at this time.[6]

1. Petitioners concede (see Pet. App. A28) that, before the receivership, City Fed had the right to bring claims against them under federal common law. They further concede (by arguing that Section 1821(k) "displaced" the federal receiver's federal common law rights) that the federal receiver would have succeeded to City Fed's ability to proceed under federal common law if City Fed had failed before the enactment of FIRREA. Petitioners argue (Pet. 10-20), however, that, by authorizing suits based on gross negligence, Section 1821(k) displaced the federal receiver's prior ability to assert claims based on the standard of liability that applies under federal common law, and created a uniform statutory standard of liability that now governs all suits by the federal receiver against officers and directors of failed federal depository institutions.

Petitioners' argument cannot be reconciled with the plain language of FIRREA. Under 12 U.S.C. 1821(d)(2)(A), the federal receiver succeeds to "all rights, titles, powers, and privileges of the insured depository institution." Thus, upon being appointed

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[6] The Court will not ordinarily "issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co.* v. *Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893). The absence of a final judgment is "of itself alone sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see also *Virginia Military Institute* v. *United States*, 113 S. Ct. 2431 (1993) (Scalia, J., concurring in denial of cert.).

as receiver, the RTC obtained the right to assert City Fed's pre-existing federal common law claims against petitioners. See *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048, 2053-2054 (1994) (when FDIC sues as receiver, it does so with same rights, and subject to same defenses, as the failed institution). Nothing in the text of Section 1821(k) places any limitations on the federal receiver's rights in that regard.

Judging from its plain text, Section 1821(k) is not a limiting statute at all. Rather, it appears to create a special rule of decision to *supplement* the rights otherwise held by the federal receiver. It provides that "[a] director or officer * * * may be held personally liable for monetary damages in any civil action by * * * [the federal receiver] * * * for gross negligence, including any similar conduct that demonstrates a greater disregard of a duty of care (than gross negligence)." 12 U.S.C. 1821(k). That language authorizes the federal receiver to file suit for gross (or even more culpable) negligence, regardless of whether a gross negligence standard of liability is available under any other source of law. In thus *authorizing* the federal receiver to sue for gross negligence, the statute does not appear to *restrict* the receiver from suing for ordinary negligence under other applicable law. If Congress had meant to accomplish the latter preemptive objective, it would most naturally have provided that the receiver "may (and may only)" sue for gross (or greater) negligence. See *FDIC* v. *Canfield*, 967 F.2d 443, 446 (10th Cir.) (en banc) (citing *Rose* v. *Rose*, 481 U.S. 619, 626-627 (1987) ("may" establishes only discretionary power)), cert. dismissed, 506 U.S. 993 (1992); *FDIC* v. *McSweeney*,

976 F.2d 532, 537 (9th Cir. 1992), cert. denied, 113 S. Ct. 2440 (1993).

The limited purpose of the substantive provision of Section 1821(k) is underscored by the savings clause, which states that "[n]othing in [Section 1821(k)] shall impair or affect any right of [the federal receiver] under other applicable law." Petitioners' belie their claimed fidelity to the statutory text (Pet. 10-11) by contending, as they did below (Pet. App. A28), that "other applicable law" means only "other sections of FIRREA or State law." When Congress intended to refer only to the laws of particular jurisdictions or other provisions of FIRREA, it did so expressly. See, *e.g.*, 12 U.S.C. 1821(c)(3)(B) ("powers imposed by State law"); 12 U.S.C. 1821(e)(3)(C)(ii) ("except as otherwise specifically provided in this section"). It did not make such a limited reference here. In the absence of any limiting terms, "other applicable law" appears to mean *any* other applicable law. Cf. *Patterson* v. *Shumate*, 504 U.S. 753, 758 (1992) ("applicable nonbankruptcy law" means "any relevant nonbankruptcy law"); *id.* at 766 ("[T]he phenomenon that three Courts of Appeals could have thought ['applicable nonbankruptcy law'] a synonym for 'state law' is mystifying.") (Scalia, J., concurring).

It is incorrect, moreover, to suggest (Pet. 13) that a literal reading of the savings clause would rob the substantive provision of its intended meaning. That would be true only if, contrary to its text, the substantive provision was intended to establish a uniform standard of liability. If, on the other hand, as the text indicates, the substantive provision was intended only to ensure the federal receiver's ability, at a minimum, to file claims for gross negligence, it accomplishes that purpose while, at the same time, the savings clause does significant service by emphasizing that the receiver is free, in addition, to pursue claims based on an ordinary negligence standard where applicable state law or federal common law authorizes such suits.

b. It would have been odd—particularly in light of Congress's stated desire to strengthen "the enforcement powers of Federal regulators of depository institutions" and "the civil sanctions * * * for defrauding or otherwise damaging depository institutions" (Pub. L. No. 101-73, § 101(9)-(10), 103 Stat. 187 (1989))—for Congress purposely to have insulated bank officers and directors from liability to the federal receiver under the federal common law standard that governed their conduct while they were serving as officers and directors and under which they could have been held liable in a suit brought by the institution before its demise. As the court of appeals concluded upon its review of the legislative history, Congress intended no such result.

Petitioners acknowledge (Pet. 14) that the legislative history of Section 1821(k) reflects that Congress's purpose was to "relieve the RTC and FDIC from the effects of certain so-called 'insulating' statutes passed by various states that required proof of intentional violations of the duty of care in order to recover civil money damages from officers and directors of corporations incorporated in those states." They assert, however, that Congress also intended to limit the federal receiver to suits based on gross or greater negligence—thus forbidding suits based on ordinary negligence—in order to avoid discouraging qualified individuals from serving as officers or directors of federally insured depository institutions. *Ibid.* That concern, however, derived

from Congress's desire not to interfere with the choice made by some States to impose liability on officers and directors of state-chartered institutions only for gross, rather than ordinary, negligence. Congress accordingly placed the federal statutory floor at gross negligence rather than ordinary negligence. *Ibid.* The report of the Senate Banking Committee makes clear, however, that Congress did not intend through Section 1821(k) to prevent the federal receiver "from pursuing claims under State law or other applicable Federal law, *if such law permits the officers or directors of a financial institution to be sued * * * for violating a lower standard of care, such as simple negligence.*" S. Rep. No. 19, 101st Cong., 1st Sess. 318 (1989) (emphasis added).[7]

2. The court of appeals held that Section 1821(k) has no application with respect to federally chartered depository institutions. The court inferred that the provision was not intended to apply to federally chartered institutions because the text "calls for the application of the 'applicable State law' formulation of gross negligence." Pet. App. A30-A31.

We agree with petitioners that the provision should be read to apply to federally chartered institutions.[8]

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[7] Although the Senate Banking Committee report was not published until after the Senate passed the initial version of FIRREA, it was circulated six weeks before the Senate and the House enacted the final version of FIRREA. Pet. App. A20.

[8] Section 1821(k) provides that the FDIC may bring an action against an officer or director of an "insured depository institution." 12 U.S.C. 1821(k). "[I]nsured depository institution" is defined in FIRREA as "any bank or savings association the deposits of which are insured by the [FDIC] pursuant to this chapter." 12 U.S.C. 1813(c)(2). The FDIC insures both federal and state chartered institutions.

Petitioners acknowledge—indeed, assert (see pages 18-19, *infra*)—that the federal common law permits suits for gross negligence. The availability of the statutory claim in suits against the officers or directors of federally chartered institutions provides an option: The receiver may choose to bring its claims under Section 1821(k) when the gross negligence standard under "applicable state law" is more favorable than the federal common law standard applicable to claims that could have been brought by the federally chartered institution in its own right.

3. There is no conflict between the decision of the court of appeals and this Court's decision in *O'Melveny*. In *O'Melveny*, the Court held that the FDIC, asserting state law attorney malpractice claims as receiver for a failed state-chartered savings association, was subject to the same state law defenses with respect to the acts or omissions of the institution's officers and directors that would have been good against the savings association itself. The Court explained that, since the federal receiver stepped into the shoes of the failed state depository institution, the receiver must "work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise." *O'Melveny*, 114 S. Ct. at 2054. The Court observed that Section 1821(k) was such a provision, because it "permit[s] claims against directors and officers for gross negligence, regardless of whether state law would require greater culpability." *Ibid.*

The result below is consistent with this Court's reasoning in *O'Melveny*. City Fed, a federally char-

tered depository institution, had the right to assert claims against its officers and directors based on federal common law. In asserting those claims, City Fed's receiver is not asking for special treatment; it is merely exercising its right to assert claims to which it succeeded under FIRREA.

4. Although petitioners correctly observe (Pet. 20-22) that there is disagreement among the lower courts on the question presented, support for petitioners' position is not as uniform as petitioners suggest. The Sixth and Seventh Circuits have held that Section 1821(k) supplants federal common law and provides the exclusive basis for suits by the federal receiver against officers and directors of federally chartered depository institutions. See *FDIC* v. *Bates*, 42 F.3d 369 (6th Cir. 1994); *RTC* v. *Gallagher*, 10 F.3d 416 (7th Cir. 1993); but see *RTC* v. *Chapman*, 29 F.3d 1120, 1126-1128 (7th Cir. 1994) (Posner, C.J., dissenting) (criticizing *Gallagher* as incorrectly decided). Although the Tenth Circuit also adopted that position in *RTC* v. *Frates*, 52 F.3d 295 (1995), the stability of that holding is questionable. The Tenth Circuit had held previously, in *FDIC* v. *Canfield*, *supra*, that Section 1821(k) does not displace the ability of the federal receiver to sue officers and directors of state-chartered institutions under state law, having concluded that "'[m]ay' is a permissive term [that] does not imply a limitation on the standards of officer and director liability," and that "'other applicable law' means *all* 'other applicable law.'" 967 F.2d at 446. The panel in *Frates* was comprised of the only two judges who dissented from the en banc decision in *Canfield* and a district court judge sitting by designation, and it did not even attempt to explain how the same language within

Section 1821(k) can be read to displace federal common law claims but not preempt state law claims. Contra *RTC* v. *Fiala*, 870 F. Supp. 962, 969 (E.D. Mo. 1994) (declaring state/federal distinction "nonsensical").

Although the Fifth Circuit in *RTC* v. *Miramon*, 22 F.3d 1357 (1994), also held that Section 1821(k) displaced federal common law claims, the holding in *Miramon* is not precisely on point. *Miramon* involved an assertion of federal common law claims against officers and directors of a state-chartered institution. The court observed that, if the federal receiver could assert federal common law claims for negligence against officers and directors of state-chartered institutions, "the explicit language of the first sentence of section 1821(k) which enunciates a cause of action for gross negligence would be rendered a nullity." 22 F.3d at 1361. The court's premise was incorrect. The federal receiver may not ordinarily assert federal common law claims against the officers and directors of a state-chartered institution. See, *e.g.*, *Burks* v. *Lasker*, 441 U.S. 471, 476 (1979); cf. *Kamen* v. *Kemper Fin. Services, Inc.*, 500 U.S. 90 (1991). Indeed, if officers and directors of state-chartered institutions were generally subject to liability under federal common law, there would have been no need to enact Section 1821(k), since the existence of state insulating statutes would have posed no barrier to suits by the federal receiver.

In *FDIC* v. *McSweeney*, *supra*, the Ninth Circuit held that Section 1821(k) did not bar the FDIC from asserting negligence-based claims against the officers and directors of a failed state-chartered institution. Like the Third Circuit, the Ninth Circuit did not read the first sentence of Section

1821(k) "as a limitation on the types of claims that the FDIC may pursue," *McSweeney*, 976 F.2d at 537; and it similarly read the savings clause to preserve *all* other applicable law, *id.* at 538-539. The court did not decide whether the federal receivers' claims in that case arose under federal common law, because (the court explained), since "the FDIC stands in the shoes of the failed financial institution and its stockholders for purposes of pursuing claims against the institution's officials[,] * * * its rights to proceed against the officers for negligent breach of the duty of care, whether under state or federal common law, are preserved by the plain language of the last sentence of § 1821(k)." *Ibid.* See also *RTC* v. *Smith*, 872 F. Supp. 805, 815-816 (RTC's claims, "whether under state law or federal law, are not preempted under section 1821(k)"), amended on other grounds, 879 F. Supp. 1059 (D. Or. 1995).[9]

5. The concerns that underlie this Court's ordinary reluctance to grant interlocutory review counsel against granting review in this case. The court of appeals decided that the federal receiver was not barred by Section 1821(k) from asserting claims against City Fed's former officers and directors under federal common law. The content of the federal common law standard, however, is not clearly established. The court thus remanded the case to the district court to determine initially what standard of liability applies under federal common law.

[9] See also, *e.g.*, *RTC* v. *Gladstone*, 895 F. Supp. 356, 365-366 (D. Mass. 1995); *Fiala*, 870 F. Supp. at 967; *RTC* v. *King*, No. 4-93-258 (D. Minn. June 8, 1994), slip op. 13; *RTC* v. *Gibson*, 829 F. Supp. 1110, 1118 (W.D. Mo. 1993); *RTC* v. *Hess*, 820 F. Supp. 1359, 1364 (D. Utah 1993); *FDIC* v. *Nihiser*, 799 F. Supp. 904, 907-908 (C.D. Ill. 1992); contra, *e.g.*, *FDIC* v. *Harrington*, 844 F. Supp. 300, 304 (N.D. Tex. 1994); *FDIC* v. *Bates*, 838 F. Supp. 1216, 1220 (N.D. Ohio 1993), rev'd in part and remanded, 42 F.3d 369 (6th Cir. 1994).

If the lower courts agree with our submission that the federal common law standard of liability for officers and directors of federally chartered depository institutions is ordinary negligence,[10] and do not rule in petitioners' favor on other grounds, petitioners could again petition for certiorari, and this Court could then take the lower courts' determination respecting that issue into account in assessing the effect of Section 1821(k). See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979) (denial of petition at interlocutory stage without prejudice to renewal of questions presented when certiorari is sought from final judgment); *Urie* v. *Thompson*, 337 U.S. 163, 172-173 (1949); see also *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973) (prior denial in this context does "not establish the law of the case or amount to *res judicata* on the points [later] raised").

The courts below may decide, however, that the *Briggs* standard does not govern. Some lower courts adjudicating cases involving federally chartered institutions have applied state law, without specifying whether the state law applies directly or rather as the appropriate rule of decision under federal common

[10] *Briggs* v. *Spaulding*, 141 U.S. 132, 152 (1891) ("that which ordinarily prudent and diligent men would exercise under similar circumstances"); see also *Bowerman* v. *Hamner*, 250 U.S. 504 (1919); see generally Gov't C.A. Br. 15-17.

law.[11] If the courts below turn to New Jersey law for the rule of decision and conclude that the standard of liability in New Jersey is gross negligence,[12] the standard applied in this case will be identical to the standard that would have been applied if this action had been decided in the Sixth, Seventh and Tenth Circuits, because Section 1821(k) (the exclusive source of law in those circuits) incorporates the gross negligence standard under applicable state law.

Petitioners have filed in the district court a motion to dismiss the complaint to the extent that it alleges claims based on ordinary negligence. They argue in support of the motion that, as a matter of uniform federal common law, "corporate officers and directors may only be held liable for conduct rising to the level of gross negligence (or a greater disregard of duty)." Memorandum of Law in Support of the Outside Directors' Motion to Dismiss the Third Amended Complaint 6. If the lower courts accept that view, petitioners and all other defendants in the Third Circuit will be in roughly the same position they would have been in had the court of appeals limited the federal receiver to a suit for gross negligence under

[11] See, *e.g.*, *Borgsmiller* v. *Burroughs*, 542 N.E.2d 1281 (App. Ct.), appeal denied, 548 N.E.2d 1066 (Ill. 1989); *Fields* v. *Sax*, 462 N.E.2d 983, 986 (Ill. App. Ct. 1984); *First Nat'l Bank* v. *Hall*, 238 S.E.2d 284 (Ga. Ct. App. 1977); *Bank of Am. Nat'l Trust & Sav. Ass'n* v. *Ryan*, 24 Cal. Rptr. 739, 744 (Cal. Dist. Ct. App. 1962); *Broadway Fed. Sav. & Loan Ass'n* v. *Howard*, 285 P.2d 61 (Cal. 1955).

[12] In the *United Savings* appeal, the RTC argued that the standard of liability under New Jersey law is ordinary negligence. Pet. App. A9.

Section 1821(k).[13] The conflict asserted by petitioners would make little, if any, practical difference in those circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1996

[13] There would be a difference only if and to the extent that the formulation adopted by the Third Circuit for the uniform federal common law gross negligence standard varies from the gross negligence formulation under "applicable state law."

(4)

Supreme Court, U.S.
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No. 95-928

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN W. ATHERTON, JR., ET AL.,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as receiver for CITY SAVINGS, F.S.B.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' REPLY BRIEF

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March 14, 1996

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ARGUMENT

In its brief in opposition ("Opp. Br.") to the petition for a writ of certiorari in this case, Respondent Federal Deposit Insurance Corporation (the "FDIC") concedes that the fundamental premise of the Third Circuit majority's ruling below -- that 12 U.S.C. § 1821(k) ("Section 1821(k)") does not apply to federally-chartered depository institutions and that "federal common law" therefore supplies the source of law in this case -- is erroneous. (Opp. Br. at 12) Yet the FDIC attempts, nevertheless, to justify the result reached by the court below, arguing in effect that it reached the right result for the wrong reasons. It does so by relying on arguments that have been rejected by each of the other courts of appeals that have considered this issue, and which even the Third Circuit majority declined to adopt. These arguments fly in the face of the plain language of Section 1821(k), and lead to a conclusion that simply cannot be reconciled with this Court's holdings in *O'Melveny & Myers v. FDIC*, ___ U.S. ___, 114 S.Ct. 2048 (1994), *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), and *United States v. Texas*, ___ U.S. ___, 113 S.Ct. 1631 (1993). Review by this Court is warranted to correct this manifest error. (*See* Point I, *infra*)

In reality, the FDIC's concession that the majority below erred in concluding that Section 1821(k) had no application to federally chartered institutions supplies yet another compelling reason why a writ of certiorari should be granted in this case. Taken together with Respondent's further concessions that the opinion below creates a clear conflict among the Circuits, and its acknowledgment that this case presents an issue of law that is of vital importance to the resolution of not only this case, but also the scores of other related pending FDIC and RTC cases, as well as future cases that may be brought by the FDIC, it is now clear that the parties agree that this case presents virtually every factor customarily recognized as warranting review by this Court. (*See* Point II, *infra*)

Finally, the FDIC argues that certiorari should be denied because the admittedly important legal issue raised in this case should not be addressed on an interlocutory appeal. This is a remarkable position for one who argued in the court

below that interlocutory review was essential in this case. The very purpose of 28 U.S.C. § 1292(b) is to permit appellate review where a case presents a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal may materially advance the ultimate termination of the litigation. Here, the district court, the court of appeals and the parties themselves have all agreed that this is the case. This Court has often granted certiorari in such cases -- particularly where, as here, a clear split among the Circuits exists on the issue presented for review. Moreover, considerations of judicial economy and fairness to the litigants weigh especially strongly in favor of review in this case, since (1) petitioners are individuals who are financing this complex litigation out of their own pockets, and (2) sending this case back to the district court for resolution of the standard of care issue will at best precipitate yet another round of interlocutory appeals and at worst could result in a lengthy trial using an erroneous legal standard -- in short, a huge waste of time and money for the parties and the courts. (*See* Point III, *infra*)

I

RESPONDENT CONCEDES THAT THE OPINION BELOW IS BASED ON AN ERRONEOUS PREMISE, AND ITS EFFORTS TO JUSTIFY THE RESULT REACHED BY THE PANEL MAJORITY ARE WHOLLY UNAVAILING

The fundamental flaw in the opinion below is its astonishing assertion that Section 1821(k) -- a *federal* statute, made applicable by its terms to all *federally*-insured depository institutions -- has no applicability to federally-chartered institutions such as City Federal. However, the FDIC now concedes that Section 1821(k) applies to federally-chartered institutions such as City Federal, and that the Third Circuit majority's holding to the contrary is erroneous. (Opp. Br. at 12)

Specifically, the FDIC acknowledges:

> Section 1821(k) provides that the FDIC may bring an action against an officer or director of an "insured depository institution." 12 U.S.C. 1821(k). "Insured depository institution" is defined in FIRREA as "any bank or savings association the deposits of which are insured by the [FDIC] pursuant to this chapter." 12 U.S.C. 1813(c)(2). The FDIC insures both federal and state chartered institutions.

(Opp. Br. at 12, n.8) Thus, Respondent states, Section 1821(k) "should be read to apply to federally chartered institutions." (Opp. Br. at 12)

Nevertheless, the FDIC argues that the result reached by the majority is sound, even though its underlying premise was not. Its arguments in favor of the result below, however, exhibit the same flaws as the majority's opinion.

First and foremost, the FDIC, like the majority below, puts the proverbial cart before the horse in interpreting Section 1821(k). It reads Section 1821(k)'s legislative history as revealing a single legislative intent -- to preempt so-called state "insulating" statutes -- and then twists the plain language of the statute to make it conform to this purpose.[1] This Court has repeatedly instructed that the first step in statutory analysis is to examine the actual statutory language used by Congress. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S 827, 835 (1990). Here, the actual language of Section 1821(k) makes clear that gross negligence is the legal standard selected by Congress to apply in cases such as this.

The FDIC asserts that because Section 1821(k) states that officers and directors "may" -- as contrasted with "may only" -- be held liable for acts of gross negligence the statute is simply a non-exclusive grant of rights. This argument was properly rejected by the Fifth, Sixth and Seventh Circuits for two reasons; not only would such a reading undermine the very cause of action that the statute creates, making it little

[1] In fact, Section 1821(k)'s legislative history makes clear that preempting state insulating statutes was not the only thing Congress had in mind when it enacted the statute. Congress also sought to avoid setting the lability threshold so low as to discourage the best qualified individuals from serving as officers and directors of savings institutions.

more than a piece of advisory legislation, but it also places undue emphasis on the word "may," a word that cannot reasonably be read to modify the substance of the provision. *FDIC v. Bates*, 42 F.3d 369, 371 (6th Cir. 1994); *Resolution Trust Corp. v. Miramon*, 22 F.3d 1357, 1361-62 (5th Cir. 1994); *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 420 (7th Cir. 1993). Significantly, even the majority below declined to base its decision on this ground. *Resolution Trust Corp. v. CityFed Financial Corp.*, 57 F.3d 1231, 1237, n.7. (3d Cir. 1995).

The FDIC also tries to limit the effect of the substantive portion of Section 1821(k) by reading the savings clause to preserve actions under federal common law, which it asserts would be governed by a simple negligence standard. This construction violates the well-established rule of statutory construction that a savings clause cannot be allowed to supersede a specific substantive provision. *See e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992); *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). If the savings clause were construed to preserve federal common law actions for simple negligence, then the language of the substantive sentence of Section 1821(k), which specifically enunciates a cause of action for gross negligence, would be rendered meaningless surplusage and a nullity. *Bates*, 42 F.3d at 372; *Miramon*, 22 F.3d at 1361-62; *Gallagher*, 10 F.3d at 420.

Respondent also maintains that there is no conflict between the decision below and this Court's decision in *O'Melveny & Myers v. FDIC*, ___ U.S. ___, 114 S.Ct. 2048 (1994). However, what the FDIC contends here is precisely what it contended, unsuccessfully, in *O'Melveny* -- that a provision of FIRREA "should be read as a nonexclusive grant of rights to the FDIC receiver, which can be supplemented or modified by federal common law." *Id.* at 2054. This Court rejected this argument in *O'Melveny*, and should do so again in this case. Indeed, the FDIC's nonexclusive-grant-of-rights argument is especially absurd since in *O'Melveny* this Court specifically listed Section 1821(k) as one of the provisions of FIRREA

that created a specific federal rule of decision, and thus supplanted federal common law. *Id.*

The FDIC attempts to turn *O'Melveny* on its head by asserting that federal common law does not supplement FIRREA, but rather that FIRREA supplements federal common law. Therefore, Respondent argues, the two are completely compatible.

This argument completely ignores this Court's explicit pronouncements in *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981), and *United States v. Texas*, ___ U.S. ___, 113 S.Ct. 1631, 1634 (1993), that federal common law is "subject to the paramount authority of Congress," and that "when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." In contrast to the rule respecting presumption of state laws, it is not necessary for Congress to "affirmatively proscribe" the federal common law rule in order to abrogate its application. *City of Milwaukee*, 451 U.S. at 315; *United States v. Texas*, 113 S.Ct. at 1634.

Here, as the FDIC concedes, Congress spoke directly to the standard of liability applicable to officers and directors of federally-chartered, federally-insured depository institutions in RTC and FDIC actions. In such a case, FIRREA does not supplement federal common law; FIRREA supplants federal common law. Indeed, this is the conclusion reached by every court of appeals that has addressed this issue. *See Resolution Trust Corp. v. Frates*, 52 F.3d 295, 297 (10th Cir. 1995) (citing *City of Milwaukee*); *Bates*, 42 F.3d at 373 (citing *United States v. Texas*); *Miramon*, 22 F.3d at 1360 (citing *City of Milwaukee* and *United States v. Texas*); *Gallagher*, 10 F.3d at 424-25 (same). The same result is warranted here.

Because the opinion below was premised upon the admittedly erroneous conclusion that Section 1821(k) has no applicability to federally-chartered depository institutions, and because the resulting ruling is incompatible with both the plain language of Section 1821(k) as well as this Court's prior holdings respecting the use and application of "federal

common law," this Court should issue a writ of certiorari to review and reverse the decision below.

II

THERE IS NO DISPUTE THAT THIS CASE PRESENTS VIRTUALLY EVERY FACTOR RECOGNIZED TO WARRANT A GRANT OF CERTIORARI

It is now clear that Respondent agrees that this case presents virtually every factor that this Court has indicated would support the granting of a writ of certiorari.

First Respondent concedes that there is a clear conflict in the Circuits.[2] This Court has often stated that a square and irreconcilable conflict among the Circuits on the same issue of federal law is an extremely weighty factor in deciding to grant certiorari. *See, e.g., Vimar Seguros Y Reaseguros, S. A. v. M/V Sky Reefer*, ___ U.S. ___ 115 S. Ct. 2322 (1995); *McElroy v. United States*, 455 U.S. 642, 643 (1981); *Marks v. United States*, 430 U.S. 188, 189 (1977).

Moreover, the FDIC acknowledges the signal importance of this issue, both to the resolution of this case and to the resolution of literally scores of other pending cases brought by the FDIC and its predecessor, the RTC, against officers and directors of federally-chartered thrift institutions. Indeed, the RTC argued, at the district court level and again to the court of appeals, that this issue presents a controlling question

[2] Citing *FDIC v. McSweeney*, 976 F.2d 532 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2440 (1993), and *FDIC v. Canfield*, 967 F.2d 443 (10th Cir.), *cert. dismissed*, 506 U.S. 993 (1992), Respondent argues that the split is not as one-sided as Petitioners believe. (Opp. Br. at 14) However, neither *McSweeney* nor *Canfield* is relevant to this case. Both cases involved displacement of state law, not federal common law. *See McSweeney*, 976 F.2d at 537; *Canfield*, 967 F.2d at 444. Moreover, assuming that *McSweeney* and *Canfield* did, in some way, support Respondent's assertion that Section 1821(k) does not preempt federal common law, the consequence would be to make the existing split in the Circuits even more pronounced than it currently is, and the need for this Court to resolve this conflict would be even more, not less, pressing than it is at present.

of law as to which there is substantial ground for difference of opinion and that an interlocutory appeal from the district court's order would materially advance the ultimate termination of the litigation. Both the district court and the court of appeals agreed with this argument, and certified this issue for interlocutory appeal. (Pet. App. A-67, A-68)

Finally, the FDIC admits that the reasoning of majority below was unsound. As discussed in Point I, *supra*, Respondent now concedes that Section 1821(k) applies to federally-chartered institutions such as City Federal, and that the Third Circuit's holding that Section 1821(k) has no application whatsoever to such institutions is erroneous. (Opp. Br. at 12) This Court has noted that certiorari is appropriate where the court below has decided an important question erroneously. *See, e.g., New York Transit Authority v. Beazer*, 440 U.S. 568, 571 (1979); *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 136 (1968); *Williams v. Lee*, 358 U.S. 217, 218 (1959).

It is thus undisputed that this case presents virtually every significant factor generally recognized to warrant the grant of a writ of certiorari. Accordingly, the writ should issue here.

III

THE COURT SHOULD HEAR THIS CASE EVEN THOUGH IT IS AN INTERLOCUTORY APPEAL

Respondent urges the Court to deny certiorari because the Third Circuit's decision arose in the context of an interlocutory appeal brought pursuant to 28 U.S.C. § 1292(b). (Opp. Br. at 8, n.6) This assertion is paradoxical, to say the least, since in the court below Respondent urged that an interlocutory appeal was appropriate and, indeed, essential here; it is, moreover, entirely without merit.

Even before Congress passed 28 U.S.C. § 1292(b), this Court often granted certiorari in cases that came up on interlocutory appeal where, as here, there was an important issue of law that was fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari. *See*,

e.g., *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947). *See also* Robert Stern, Eugene Gressman, Stephen Shapiro and Kenneth Geller, *Supreme Court Practice and Procedure*, § 4.18 (1993).

By passing the Interlocutory Appeals Act, Congress indicated that it favored interlocutory appeals where, as here, the district court and the court of appeals agreed that there is "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order [appealed from] may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Since the Act's passage, this Court has often granted certiorari in cases appealed pursuant to 28 U.S.C. § 1292(b). *See, e.g.*, *Vimar Seguros Y Reaseguros, S. A. v. M/V Sky Reefer*, ___ U.S. ___ 115 S. Ct. 2322 (1995); *United States v. 92 Buena Vista Ave.*, 507 U.S. 111 (1992); *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990).

Like the court of appeals decisions in *Vimar Seguros, 92 Buena Vista Ave.*, and *Utilicorp United,* the decision below has created a conflict among the Circuits. The decision below also conflicts with recent decisions of this Court, contradicts the plain language of Section 1821(k) and violates well-established rules of statutory construction. Further, this case is of widespread importance both in numerous pending and future cases, and to the banking and thrift industries as a whole. In addition, the district court, the court of appeals and every one of the parties in this case has asserted that the question now presented for certiorari is "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order [below] may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

Significantly, three of the other four courts of appeals to address this issue addressed it on interlocutory appeal, either pursuant to 28 U.S.C. § 1292(b) or Fed. R. Civ. P. 54(b). *See Frates*, 52 F.3d at 296; *Miramon*, 22 F.3d at 1358; *Gallagher*, 10 F.3d at 418. In each of these cases, the district court found

and the court of appeals confirmed that the requirements of 28 U.S.C. § 1292(b) had been met or that there was "no just reason for delay" under Fed. R. Civ. P. 54(b). That four courts of appeals have made this same determination demonstrates that this issue is truly a critical question affecting the entire body of cases that are outstanding in this area and is appropriate for resolution now.

Moreover, to deny certiorari at this time and send the parties back to the trial court for a determination of the appropriate standard of care under federal common law would result in an enormous waste of judicial resources. The district court's decision almost certainly will result in a second interlocutory appeal to the court of appeals and a second petition for a writ of certiorari. If certiorari is not granted at that time, the parties and the district court will then proceed to try this extremely complex case,[3] using a possibly erroneous legal standard, following which, the losing party will again appeal to the court of appeals, and then again petition for certiorari, in order to determine the standard of care that it believes should have been applied at trial.

In addition, should certiorari be denied, courts and litigants in scores of similar cases in the Third Circuit and elsewhere will spend substantial resources struggling to define the standard of care for officer and director liability under federal common law,[4] when it is not even clear that federal common law applies. Finally, this situation cries out for prompt resolution by this Court, since Petitioners, like hundreds of other defendants in these cases, are private individuals financing their defenses out of their own pockets, and are facing an

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[3] This litigation involves hundreds of thousands of documents, and involves three complex acquisition, development and construction loans. The trial of this case will take weeks, and possibly even months.

[4] It is noteworthy that the only guidance that either the court below or the FDIC has given as to the content of a federal common law of officer and director liability is two cases that were decided several decades before *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

adversary (the United States government) with virtually limitless resources.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition for a Writ of Certiorari, this Court should grant a writ of certiorari to review the Third Circuit's decision that Section 1821(k) does not supplant "federal common law" regarding the standard of liability for officers and directors of failed federally chartered financial institutions, and should summarily reverse that decision.

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March 14, 1996

(3)

No. 95-928

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JOHN W. ATHERTON, JR., *et al.*,

Petitioners,

v.

RESOLUTION TRUST CORPORATION,
IN ITS CAPACITY AS RECEIVER FOR CITY SAVINGS, F.S.B.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, *et al.*, IN SUPPORT OF PETITIONERS

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ISSUE PRESENTED FOR REVIEW

Whether "federal common law" causes of action by the federal bank regulatory agencies against officers and directors of failed insured institutions survived the enactment of Section 212(k) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 1821(k).

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IN THE
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OCTOBER TERM, 1995

No. 95-928

JOHN W. ATHERTON, JR., ET AL.,

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v.

RESOLUTION TRUST CORPORATION,
IN ITS CAPACITY AS RECEIVER
FOR CITY SAVINGS, F.S.B.,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

**BRIEF OF THE AMICI CURIAE
AMERICAN BANKERS ASSOCIATION, et al.,
IN SUPPORT OF PETITIONERS**

The American Bankers Association, et al., hereby respectfully submit this brief as amici curiae in support of the Petitioner in accordance with the provisions of Rule 37.2 of the Supreme Court Rules. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICI CURIAE

This is a case in which the Resolution Trust Corporation (now replaced by the Federal Deposit Insurance Corporation), as receiver, filed suit against the officers and directors of a federally chartered and insured depository institution for damages allegedly caused to the institution and to the receiver by, among other things, the alleged simple negligence of the officers and directors. A federal statute, 12 U.S.C. § 1821(k), authorizes suits by the FDIC against officers and directors for gross negligence. The same statute contains a "savings clause" providing that the statute does not "impair or affect any right of the Corporation under other applicable law." The FDIC contends that it is this clause that permits it to sue for simple negligence, because, the agency says, that is the federal common law standard to which the directors and officers are held.

The American Bankers Association is the largest national trade association of the commercial banking industry in the United States, having member banks located in each of the fifty states and the District of Columbia. Member banks of the Association include national and state-chartered banks, independent and holding company owned banks, and money center, regional and community banks. ABA member banks hold approximately ninety percent of the domestic assets of the American banking industry.

America's Community Bankers is a national trade association for 2000 savings and community financial institutions and related business firms. The industry has more than $1 trillion in assets, 253,000 employees and

14,500 offices. ACB members have diverse business strategies based on consumer financial services, housing finance and community development.

The Bankers Roundtable is a national association whose membership is open to the nation's largest 125 banking companies, which are represented in the Roundtable by the CEOs and highest officers of the companies. The companies hold approximately seventy percent of the country's commercial banking assets, operate in virtually every state and employ almost 1 million individuals. The mission of the Roundtable is to promote the business of banking, to encourage the development of sound banking and financial policies and practices, and to advocate the interests of its member companies in federal legislative, regulatory and judicial fora.

The Independent Bankers Association of America is the national trade association that exclusively represents the interests of community banks. Its membership includes nearly 6000 financial institutions in all fifty states and the District of Columbia.

While none of the Associations include failed institutions or the former officers or directors of such institutions as such in their respective memberships, each Association still has a distinct interest in the resolution of the issues presented by this case. It is clearly in the interests of member institutions of the Associations (not to mention the public interest) that they be served by high quality directors and officers. Having a clearly defined standard of conduct is critical to the recruitment and retention of qualified

officers and directors. Because of decisions such as the one for which review is sought here, present and prospective directors of federally insured institutions necessarily must look over their shoulders and ask themselves hard self-interested questions before agreeing to serve or continue to serve on an institution's board.

Simply put, there is a greater risk of personal--and uninsurable--liability that affixes to directors of insured depository institutions than to directors of other businesses:

o Directors of other businesses are protected by state law "business judgment rules," which elevate the standard of liability in actions against them from simple to gross negligence[1] and thereby guard against liability for errors of judgment made honestly and in good faith. If the Federal Deposit Insurance Corporation and the Third Circuit majority are correct in this case, no such protection is available to directors of federally insured depository institutions. Those directors may be called upon to respond in damages when decisions they make on an informed and reasoned basis turn out badly--as they sometimes do in any business as a result of events beyond anyone's control.

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[1] *See,, e.g. Aronson v. Lewis*, 473 A.2d 805, 812 (Del., 1984); *Auerbach v. Bennett*, 47 N.Y.2d 619, 630-31 (1979); *International Ins. Co. v. Johns*, 874 F.2d 1447, 1458 (11th Cir. 1989)(Florida law); *In re General Tire & Rubber Co. Securities Litigation*, 726 F.2d 1075, 1080 (6th Cir.), *cert. denied*, 469 U.S. 858 (1984)(Ohio law); *Lewis v. Anderson*, 615 F.2d 778, 781 (9th Cir. 1979)(California law).

o Directors of other businesses are not subject to a regulatory regime that is as pervasive as the one that governs federally insured depository institutions.[2] Consequently, directors of other businesses are little affected by a "regulatory exclusion" that might be present in the business's director and officer liability insurance policy.[3] But to a director of an insured financial institution, that is a critical consideration. A regulatory exclusion clause in an insurance contract is a denial of coverage for what is perhaps the most likely type of lawsuit to be filed against a bank or thrift director in the event of a failure of the institution. Even where a liability policy is available without a "regulatory exclusion" provision, the cost of it is prohibitive because the risk of a suit by a regulatory agency is so much greater in the case of the financial industry than in the case of other business.

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[2] "The regulation of banking may be more intensive than the regulation of any other industry, and it is the oldest system of economic regulation." K. Davis, *Administrative Law* § 4.04 at 247 (1st ed. 1958). If anything, it has gotten even more intensive since Professor Davis wrote.

[3] A "regulatory exclusion" is an insurance contract provision that excludes from coverage suits brought by a federal regulator. The validity of such exclusions, with respect to financial institutions' policies, has regularly been upheld by the courts despite arguments of the FDIC and others that a regulatory exclusion is void as against public policy. *See, e.g., Fidelity & Deposit Co. v. Conner*, 973 F.2d 1236 (5th Cir. 1992); *St. Paul Fire & Marine Ins. Co. v. FDIC*, 968 F.2d 695 (8th Cir. 1992); *FDIC v. Aetna Casualty & Surety Co.*, 903 F.2d 1073 (6th Cir. 1990).

Your amici respectfully suggest that the United States Congress drew the proper balance, in 1989, between two important but conflicting objectives. Congress wished to preserve and protect the federal deposit insurance funds by enabling the cognizant federal regulatory agencies to pursue directors and officers of failed institutions for damages under some circumstances. Prior to 1989, at least some states had attempted to insulate directors and officers from such litigation almost entirely, and that was an outcome unpalatable to Congress.[4] Concurrently, Congress did not wish to discourage a willingness on the part of highly qualified and experienced people to serve on the boards of directors of federally insured institutions.[5]

The "compromise" between these competing objectives was the enactment, in 12 U.S.C. § 1821(k), of an explicit national "gross negligence" standard applicable to suits for damages by the banking agencies against the officers and directors of failed institutions. "Gross negligence" is a higher standard of care than would have been permitted under state "insulating" statutes, but a lesser standard of care than "simple negligence."

After four United States Court of Appeals decisions upholding exactly this common sense interpretation of the

[4] *See, e.g.*, 135 Cong. Rec. 7152-53 (Apr. 19, 1989) (Statement by Senator Riegle).

[5] *See* 135 Cong. Rec. 7137 (April 19, 1989)(Statement of Senator Heflin); *accord* 135 Cong. Rec. 7143 (April 19, 1989)(Statement of Senator Sanford).

statute, your amici, their members, the actual or prospective officers and directors of insured institutions, and counsel advising them, all had reason to believe that the law was settled, and that the personal risks of service as a director or officer could be fairly assessed. Now the decision of the Third Circuit below has cast the law once again into a state of disarray and turmoil. Only this Court can set it right again.

REASONS FOR GRANTING THE WRIT

The Petition for Writ of Certiorari filed in this case correctly points out that the decision of the Third Circuit is in direct and irreconcilable conflict with the plain language of 12 U.S.C. Section 1821(k) and with the decisions of four other U.S. Courts of Appeals on the same subject: *RTC v. Gallagher*, 10 F.3d 416 (7th Cir. 1993); *RTC v. Miramon*, 22 F.3d 1357 (5th Cir. 1994); *FDIC v. Bates*, 42 F.3d 369 (6th Cir. 1994); and *RTC v. Frates*, 52 F.3d 295 (10th Cir. 1995).

The Petition likewise points out that the Third Circuit decision below, to the extent that it allows for the continued existence of some sort of "federal common law" simple negligence standard of liability since the enactment of 12 U.S.C. Section 1821(k) as part of the Financial Institutions Reform, Recovery and Enforcement Act of 1989[6] ("FIRREA"), is impossible to square with this Court's 1994 decision in *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994). In that case, which arose exactly in the context of

[6] Pub. L. 101-73, 103 Stat. 183 (1989)

FIRREA, this Court applied a familiar doctrine of nearly six decade's standing: "There is no federal general common law." *O'Melveny & Myers v. FDIC*, 114 S. Ct. at 2053 (quoting *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

Your amici concur that those arguments constitute good and sufficient cause to grant the Petition. We appear here to emphasize the importance of the issue, as set forth in the preceding section of this brief, and to raise a related point: the conflict among the circuits created by the decision below extends beyond that discussed in the Petition.

The decision of the court below may best be characterized as one that cannot see the forest for the twigs. The court acknowledges that "Section 1821(k) was enacted as part of FIRREA, a massive 371-page legislative package"[7] that was designed generally to strengthen enforcement powers of the FDIC. Little, if any, mention is made, thereafter, of how Section 1821(k) fits within the detailed enforcement scheme created by that "massive" law. Indeed, in the court's discussion of "The Plain Meaning of the Statute" (57 F.3d at 1237-38, Pet. App. at A-13 - A-15), which is admitted to be "the starting point for interpretation," the court barely acknowledges that the words "gross negligence" appear in the statute at all. Rather, the court focuses almost exclusively upon the "savings clause," a small phrase in a small section of a large bill.

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[7] *RTC v. Citifed Financial Corp.*, 57 F.3d 1231, 1239 (3d Cir. 1995), Pet.App. at A-15

The unduly narrow focus of the court continues in its discussion of legislative history. The Petitioners argue (and we agree) that there was a real Congressional concern that FIRREA not be made so onerous as to discourage the best qualified persons from serving as directors of insured financial institutions. They cite for that proposition a statement by Senator Heflin during the debates preceding enactment of the statute. The court below disagreed solely on the grounds that Senator Heflin was talking about a different section of the law at the time. (57 F.3d at 1240 n. 13, Pet. App. at A-19 n.13). That analysis implausibly attributes to Congress (or at least to Senator Heflin) a willingness to discourage service as a director so long as it is not done in the specific section of the law then under discussion.

But it is clear that a proper interpretation of the applicable law here requires its placement in the larger context of FIRREA as a whole. This Court has effectively so held in *O'Melveny & Myers*, *supra*. That case involved, on its facts, a different section of FIRREA than is relevant in this case: Section 1821(d)(2)(A)(i), governing succession by the FDIC to all right, title, power and privilege of the institution for which it is appointed receiver. The FDIC argued there, as it does here, that the specific provision in issue was "nonexclusive" and could be supplemented or modified by federal common law. This Court concluded that such an argument was "demolished" by virtue of the fact that FIRREA, in its other provisions **(including most emphatically the provision directly applicable in this case)** "specifically create[d] special federal rules of decision regarding claims by, and defenses against, the FDIC as

receiver." *O'Melveny & Myers*, 114 S. Ct. at 2054.

Thus the Third Circuit has misapprehended the breadth of the statutory occupation of the field that resulted from the enactment of FIRREA, as definitively construed by this Court. Other circuits have not made the same mistake, thereby raising yet an additional conflict among the circuits created by the decision below.

While the Third Circuit narrowly construes FIRREA's supplanting effect by focusing only on isolated language, three (arguably four) other circuits have applied FIRREA broadly enough so that even the venerable *D'Oench, Duhme* doctrine[8] of "federal common law" is held to have been ousted. While this Court had no occasion to deal specifically with the *D'Oench, Duhme* doctrine in *O'Melveny & Myers*, that latter decision did list the FIRREA "codification" of the doctrine (12 U.S.C. § 1821(d)(9)) as another of the "special federal rules of decision" that, like Section 1821(k), are statutory rules that would be altered, not supplemented, by the addition of a "federal common law" gloss. Subsequent to this Court's *O'Melveny & Myers* decision, the District of Columbia Circuit held that the effect of that decision had been to destroy the grounds for any continuing validity of the common law *D'Oench, Duhme* doctrine. *Murphy v. FDIC*, 61 F.3d 34, 38-39 (D.C. Cir. 1995). In its decision on remand from this Court, the Ninth Circuit agreed, holding specifically that *D'Oench, Duhme & Co. v. FDIC* was one of several named cases that "have now

[8] *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

been overruled by the Supreme Court." *FDIC v. O'Melveny & Myers*, 61 F.3d 17, 19 (9th Cir. 1995). The Eighth Circuit likewise agrees, holding "that *O'Melveny* removes the federal common law *D'Oench, Duhme* doctrine and the federal holder in due course doctrine as separate bars to [plaintiff's] defense." *DiVall Insured Income Fund v. Boatmen's First National Bank of Kansas City*, 69 F.3d 1398, 1402 (8th Cir. 1995). Finally, the Seventh Circuit noted (with apparent approval, though not directly so holding) that "several recent cases have suggested that the common law *D'Oench* doctrine did not survive" the enactment of FIRREA, and that that question "is likely to be central to future actions brought by the RTC." *Hillman v. RTC*, 66 F.3d 141, 142 n. 2 (7th Cir. 1995). Similarly, the enactment of FIRREA's Section 1821(k) supplants any previous federal common law standard of care for directors and officers of insured financial institutions.

The Third Circuit's decision below, in its narrow focus upon a single sentence in a massive law, is incompatible with the analyses of its sister circuits.

CONCLUSION

The proper interpretation of 12 U.S.C. Section 1821(k), even in isolation, is, in its own right, a matter of considerable importance to the government, the banking industry, and the public at large. On that discrete question of federal law, there is a conflict among the federal circuits that have considered it. On that alone, this Court should grant the Petition for Writ of Certiorari. But for the reasons set forth above, the more fundamental issue raised by this case, i.e., the extent to which the Financial Institutions Reform, Recovery and Enforcement Act of 1989 occupies the field, to the exclusion of "supplementary" law, necessarily has implications far transcending even that already important question. The guidance of this Court to bench and bar is urgently required. The Petition should be granted.

Respectfully submitted,

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(5)

No. 95-928

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OCTOBER TERM, 1995

JOHN W. ATHERTON, JR.,

Petitioner,

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Respondent.

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BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, ET AL., IN SUPPORT OF PETITIONER

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ISSUE PRESENTED FOR REVIEW

Whether "federal common law" causes of action by the federal bank regulatory agencies against officers and directors of failed insured institutions survived the enactment of Section 212(k) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 1821(k).

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The Independent Bankers Association of America is the national trade association that exclusively represents the interests of community banks. Its membership includes nearly six thousand financial institutions in all fifty states and the District of Columbia.

Each of the Associations, on behalf of their respective members, has a distinct interest in the resolution of the issues presented by this case. Federally insured financial institutions need to attract and retain high quality directors and officers, not only for their own benefit, but also to see that governmental and public interests in the safe and sound operation of such institutions are served as well.

The Third Circuit's decision below, however, has at least the potential of subjecting officers and directors of insured institutions to a "simple negligence" standard of care. That standard is a more uncompromising one than that faced by the directors and officers or virtually any other business,[1] and directors and officers of insured financial

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[1] Directors of other businesses are typically protected by state law "business judgment rules," which impose a gross negligence standard of liability in actions against them, thereby guarding them against liability for errors of judgment made honestly and in good faith. See,, e.g. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del., 1984); *Auerbach v. Bennett*, 47 N.Y.2d 619, 630-31 (1979); *International Ins. Co. v. Johns*, 874 F.2d 1447, 1458 (11th Cir. 1989)(Florida law); *In re General Tire & Rubber Co. Securities Litigation*, 726 F.2d 1075, 1080 (6th Cir.), *cert. denied*, 469 U.S. 858 (1984)(Ohio law); *Lewis v. Anderson*, 615 F.2d 778, 781 (9th Cir. 1979)(California law). A simple negligence

institutions are virtually uninsurable for actions taken against them by federal regulatory agencies.[2] Those factors, taken together, provide a powerful disincentive to service as a director or officer of an insured institution. The risk of personal financial ruin is simply too great.

Since Congress has spoken directly on the question of what should be the standard of care applicable to officers and directors of insured institutions post-receivership, and has explicitly provided that the answer is a "gross negligence" standard, there is neither the need nor the justification for a judicially-created standard that differs from that, no reason to subject officers and directors to the standard of care that

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standard, on the other hand, will leave directors of federally insured depository institutions susceptible to damages when reasonable decisions they make turn out badly--as they sometimes do in any business as a result of events beyond anyone's control.

[2] A "regulatory exclusion" is a common insurance contract provision that excludes from coverage suits brought by a federal regulator. The validity of such exclusions, with respect to financial institutions' policies, has regularly been upheld by the courts despite arguments of the FDIC and others that a regulatory exclusion is void as against public policy. *See, e.g., Fidelity & Deposit Co. v. Conner*, 973 F.2d 1236 (5th Cir. 1992); *St. Paul Fire & Marine Ins. Co. v. FDIC*, 968 F.2d 695 (8th Cir. 1992); *FDIC v. Aetna Casualty & Surety Co.*, 903 F.2d 1073 (6th Cir. 1990). Even where a liability policy is available without a "regulatory exclusion" provision, the cost of it is prohibitive.

would dissuade them from accepting such a position. It is to protect the rights of their respective members' officers and directors to be free from an excessive standard that your amici appear in this case.

SUMMARY OF THE ARGUMENT

In 1989, Congress enacted a uniform, nationwide standard of care for directors and officers of federally insured financial institutions. By its plain language, the statute sets that standard as "gross negligence" or any disregard of duty greater than that. The retention of a yet-to-be-defined "federal common law" standard after enactment of the statute alters, rather than supplements the statutory standard. If such a standard ever existed, it has been supplanted by the enactment of the 1989 statute; that was the intent of Congress as shown by the words it chose to use in the statute and by the course of events surrounding enactment of the statute. This Court, as well, has viewed the 1989 statute as supplanting "federal common law" in a context so close to that presented by this case as to be all but indistinguishable.

ARGUMENT

Almost six decades ago, this Court declared that "[t]here is no federal general common law." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

Two years ago, this Court declared that "[t]here is no federal general common law." *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2053 (1994).

Notwithstanding that, the Third Circuit below has directed the District Court "to permit the RTC[3] to pursue any claims for negligence or breach of fiduciary duty available as a matter of federal common law." *Resolution Trust Corp. v. CityFed Financial Corp.*, 57 F.3d 1231, 1249 (3d Cir. 1995). It is a fool's errand on which the District Court has been sent in light of the clarity and consistency with which this Court has dealt with the matter of federal general common law.

This case arises under the provisions of Section 212(k) of the Financial Institutions Reform, Recovery & Enforcement Act of 1989 (Pub. L. No. 101-73, 103 Stat. 183, 243 (1989)). The statute provides, in relevant part, that

> [a] director or officer of an insured depository institution may be held personally liable for money damages in any civil action by, on behalf of, or at the request or direction of the [Federal Deposit Insurance] Corporation... acting as conservator or receiver of such institution...for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are

[3] The Resolution Trust Corporation ("RTC"), the party below and the original Respondent in this Court, ceased to exist on December 31, 1995, the Federal Deposit Insurance Corporation succeeding to its duties and responsibilities as of that date. *See* 12 U.S.C. § 1441a(m)(1).

> defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.

12 U.S.C. § 1821(k).

In this case, the RTC, in its capacity as receiver for a failed federally-chartered and federally-insured institution, City Federal Savings Bank, sued certain former officers and directors of the institution (including the Petitioner) for both gross and simple negligence in the conduct of their duties. The officers and directors contended that the aforementioned statute had set a uniform national standard of "gross negligence," and that no cause of action would lie against them for conduct that did not rise to that level. The RTC contended--and the Third Circuit agreed--that the "savings clause" appearing as the last sentence of Section 212(k) trumped the earlier part of the Section, preserving some sort of unarticulated "federal common law" remedy for the RTC.

The difficulty with the Third Circuit's analysis is that it is inconsistent with the plain language of the statute, at odds with the historical context in which the statute was enacted, and it manifestly disregards this Court's recent holding in *O'Melveny & Myers v. FDIC*.

A. The Plain Language of the Statute

The statute unquestionably provides that officers and directors **may** be sued for gross negligence and anything else that exhibits a disregard of duty **greater** than gross

negligence. There is a necessary negative inference that must be drawn from that language, namely, that officers and directors may **not** be sued for any alleged disregard of duty that does **not** rise to the level of gross negligence. Without that negative inference, the statute is meaningless. As the Sixth Circuit has held, "[i]f the court reads the savings clause to preserve simple negligence claims, then the gross negligence standard explicitly articulated in the savings clause [sic] is redundant, meaningless surplusage." *FDIC v. Bates*, 42 F.3d 369, 372 (6th Cir. 1994). Fundamental rules of statutory construction prohibit such an interpretation. *See Astoria Federal Savings & Loan Association v. Solimino*, 501 U.S. 104, 112 (1991); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *United States v. Menasche*, 348 U.S. 528, 538 (1955).

Conversely, giving meaning and effect to the "gross negligence" standard set forth in the bulk of the statute does not have the effect of writing the "savings clause" out of the statute. There is a great deal of "other applicable law" that is "saved" by that clause. By granting the Corporation the right to bring a civil action for damages, for example, the law was not intended to deprive the Corporation of its rights under 12 U.S.C. Section 1818 to pursue such administrative remedies as cease and desist orders including affirmative action to correct conditions resulting from violations of law, rule or regulation or from unsafe or unsound practices, prohibition orders against institution-affiliated parties, or the pursuit of civil money penalties. But for the "savings clause" in Section 212(k) of FIRREA, it is possible that Section 212(k), concerning civil litigation for gross negligence, could have been construed as the exclusive

remedy for alleged misdeeds of officers and directors of failed insured institutions. (*See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-20 (1979) ("[W]here a statute provides a particular remedy or remedies, a court must be chary of reading others into it.")) Consequently, it is not necessary, in order to find substance to the "savings clause" for that clause to be construed as "saving" some "federal common law" that would need to be created anew simply in order to be "saved."

B. Other Evidence of Congressional Intent

If the language of the statute itself is not plain enough on its face or by application of normal rules of statutory construction, the context in which the statute was enacted makes it clear that the legislature was attempting to draw a balance between two important objectives. On the one hand, Congress wished to preserve and protect the federal deposit insurance funds by enabling the cognizant federal regulatory agencies to pursue directors and officers of failed institutions for damages under some circumstances. Those deposit insurance funds were, at the time, endangered due to the remarkable number of financial institution failures in the decade preceding enactment of the statute.

Prior to 1989, at least some states had attempted to insulate directors and officers from personal liability for any of their actions short of actual willful misconduct, and that was an outcome unacceptable to Congress.[4] However,

[4] *See, e.g.*, 135 Cong. Rec. 7152-53 (Apr. 19, 1989) (Statement by Senator Riegle).

Congress did not wish to discourage a willingness on the part of highly qualified and experienced people to serve on the boards of directors of federally insured institutions.[5]

For that reason, Congress deliberately avoided the creation of a federal simple negligence standard because such a low threshold of culpability would dissuade qualified persons from serving as directors and officers.

Indeed, the original Senate bill provided for the exact standard of liability that the RTC has repeatedly asked courts to legislate judicially:

> any cause of action available at common law, including, but not limited to, negligence, gross negligence, willful misconduct, breach of fiduciary duty, breach of contract, conversion, fraud, waste of corporate assets, and violations of statutes.

S. 774, 101st Cong., 1st Sess. § 214(n) (1989). That is not, however, the statute passed by Congress.

In debating the proposed bill, several senators argued that it went overboard and would deter qualified individuals from serving as directors and officers. For example, in commenting on a related civil penalty provision of FIRREA, a number of senators wanted:

[5] *See* 135 Cong. Rec. 7137 (April 19, 1989)(Statement of Senator Heflin); *accord* 135 Cong. Rec. 7143 (April 19, 1989)(Statement of Senator Sanford).

> to ensure that financial institutions are able to attract strong and capable individuals as directors and officers.
>
> * * * *
>
> [W]ithout clarifying amendment, financial institutions may lose effective directors, maybe an entire board of directors.

135 Cong. Rec. at S4264 (daily ed. Apr. 19, 1989).

In response to these concerns, *see id.* at S4265, Senator Riegle, the floor manager for the bill, submitted an amendment which deleted the simple negligence cause of action and substituted language which, with only minor changes, became Section 212(k):

> (n) Liability -- A director or officer of an insured financial institution may be held personally liable...for gross negligence or intentional tortious conduct, as those terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right, if any, of the Corporation that may have existed immediately prior to the enactment of the FIRREA Act.

Id. at S4451-52. Speaking in favor of these modifications, Senator Sanford stated that:

> these changes are essential if we are to attract qualified officers and directors to serve in our financial institutions.... The amendment would permit the FDIC to bring an action or direct others to bring an action against the directors and officers of a financial institution if the director or officer acted with gross negligence or committed an intentional tort.

Id. at S4276-77. The Senator's comments reflect the deletion of simple negligence from Section 212(k).

The House made no substantive changes to Section 212(k), and the House-Senate Conference Report confirmed that the minimum standard of liability is gross negligence:

> Title II preempts State law with respect to claims brought by the FDIC in any cap[a]city against officers or directors of an insured depository institution. The preemption allows the FDIC to pursue claims for gross negligence or any conduct that demonstrates a greater disregard of a duty of care, including intentional tortious conduct.

H.R. Conf. Rep. No. 222, 101st Cong. 1st Sess. 393, 398 (1989), *reprinted in* 1989 U.S. Code Cong. & Admin. News 532, 437. As the "final statement of terms agreed upon by both houses of Congress, next to the statute itself, [the Conference Report] is the most persuasive evidence of

Congressional intent." *Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir.), *cert. denied*, 479 U.S. 868 (1986).[6]

The post-enactment course of events relating to Section 212(k) is also relevant to an understanding of Congress' intent. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 687 n. 7 (1979). Indeed, the government's subsequent efforts to have Section 212(k) amended so as to codify a simple negligence standard undercuts contrary arguments that the statute, as enacted, preserved a floating federal common law cause of action.

First, in August 1991, the FDIC submitted to Congress a proposed amended savings clause which provided that:

> Nothing in the subsection shall impair or affect any right of the [FDIC] under other *applicable State or Federal law, including a right to hold such director or officer personally liable for negligence.*

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[6] *See also York v. Wichita Falls*, 944 F.2d 236, 240 (5th Cir. 1991) (court looked to conference report as "most significant legislative history"). The Third Circuit instead relied on the Senate Banking Committee's section-by-section analysis of S. 774. That analysis, however, was released two months *after* the Senate debated and passed S. 774 and thus was not part of the contemporaneous legislative consideration of S. 774.

Leibold, *Federal Common Law: What & Where?*, in CIVIL & CRIMINAL LIABILITY OF OFFICERS, DIRECTORS & PROFESSIONALS: BANK & THRIFT LITIGATION IN THE 1990'S 153, 161 (PLI 1991) (emphasis added). Then, after the FDIC withdrew this clear proposal, Congressman Baker, at the request of the FDIC, submitted a somewhat obscure amendment deleting Section 212(k)'s savings clause and providing that the statute retained:

> any right of the [FDIC] under any provision of *applicable State law or other Federal Law, including any provision of common law* or any law establishing the personal liability of any director or officer of any insured depository institution under any standard pursuant to such law.

H.R. 3435, 102nd Cong., 1st Sess. § 228 (Comm. Mark-up Oct. 18, 1991) (The "Baker Amendment") (emphasis added). After Congressman Schumer objected to the proposal and expressed the same concerns as in the original Senate debate on FIRREA--i.e., that the FDIC had gone "too far" and that no one would serve as a director of a financial institution if "liable for everything under the sun." House Banking Comm. Tr. at 283 (Nov. 19, 1991)--the Baker Amendment was withdrawn.

The only snippets of legislative history that purport to support the government's position thus are a version of the bill that was not enacted and a report which did not exist when senators voted on the version of the bill debated on the Senate floor. In contrast, the overwhelming weight of

FIRREA's legislative history confirms a gross negligence standard.

C. *O'Melveny & Myers v. FDIC*

As indicated above, this Court has recently -- in the context of FIRREA -- held that there is no federal general common law. That case involved, on its facts, a different section of FIRREA than is relevant in this case (12 U.S.C. Section 1821(d)(2)(A)(i), governing succession by the FDIC to all right, title, power and privilege of the institution for which it is appointed receiver). The FDIC argued there that the specific provision in issue was "nonexclusive" and could be supplemented or modified by federal common law. This Court concluded that such an argument was "demolished" by virtue of the fact that FIRREA, in its other provisions, including the provision directly applicable in this case, "specifically create[d] special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver." *O'Melveny & Myers*, 114 S. Ct. at 2054.

Thus the Third Circuit has misapprehended the breadth of the statutory occupation of the field that resulted from the enactment of FIRREA, as definitively construed by this Court.

CONCLUSION

For all of the reasons set forth herein and in the Brief of the Petitioner, your amici hereby respectfully urge that the decision of the Third Circuit be reversed.

Respectfully submitted,

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June 27, 1996

(6)

No. 95-928

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN W. ATHERTON, JR.,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR CITY SAVINGS, F.S.B.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether, in suits for money damages brought by the Resolution Trust Corporation (RTC) against directors or officers of failed federally chartered depository institutions, the gross negligence standard of 12 U.S.C. § 1821(k) (1994), enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (FIRREA), supplants any federal common law simple negligence standard that may have pre-dated FIRREA.

2. Whether, even if § 1821(k) does not supplant federal common law, federal courts are nevertheless precluded from applying any federal common law standard of liability to the conduct of directors and officers of federally chartered depository institutions in light of *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A50) is reported at 57 F.3d 1231. The decision of the United States District Court for the District of New Jersey (Pet. App. A57-A67) is not reported.

JURISDICTION

The court of appeals issued its decision on June 23, 1995 (Pet. App. A2-A50). A timely petition for rehearing with request for rehearing *en banc* was denied on September 14, 1995 (Pet. App. A55-A56). The judgment of the court of appeals was issued on September 22, 1995 (Pet. App. A51-A53). The petition for a writ of certiorari was filed on December 12, 1995, and was granted on April 15, 1996. 116 S. Ct. 1415 (1996). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

12 U.S.C. § 1821(k) (1994):

Liability of directors and officers. A director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by, on behalf of, or at the request or direction of the Corporation, which action is prosecuted wholly or partially for the benefit of the Corporation—

(1) acting as conservator or receiver of such institution,

(2) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed by such receiver or conservator, or

(3) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed in whole or in part by an insured depository institution or its affiliate in connection with assistance provided under section 1823 of this title,

for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than

gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.

STATEMENT OF THE CASE

In 1989, Congress enacted § 212(k) of the Financial Institutions, Reform, Recovery, and Enforcement Act of 1989 (FIRREA), codified at 12 U.S.C. § 1821(k) (§ 1821(k) or Section 1821(k)), which provides that a director or officer of an insured depository institution may be held personally liable for money damages in a suit brought by the RTC[1] as receiver of such institution "for gross negligence" or "conduct that demonstrates a greater disregard of a duty of care (than gross negligence)." A "savings clause" of § 1821(k) provides that nothing in § 1821(k) shall impair or affect any right of the RTC under "other applicable law."

This case presents for review a divided decision by a three-judge panel of the Third Circuit in which the majority held that (i) § 1821(k) has no applicability to federally chartered depository institutions; (ii) because of the savings clause, § 1821(k) does not displace allegedly pre-existing federal common law claims against directors and officers of federally chartered institutions; (iii) state law has no applicability to federally chartered institutions; and (iv) therefore, the RTC may only assert federal common law claims against the directors and officers of federally chartered institutions.

The majority's position, rejected by four other federal circuits, should be reversed because it is in clear conflict with decisions of this Court, most particularly, the Court's recent decision in *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994).

[1] Pursuant to 12 U.S.C. § 1441a(m)(1) (1994), the RTC ceased to exist on December 31, 1995, and was succeeded in all its capacities by the Federal Deposit Insurance Corporation (FDIC) on that date. Accordingly, the FDIC has been substituted for the RTC as the respondent in this case.

1. The Applicable Statutory Framework

Before and after the enactment of FIRREA in 1989, both the states and the federal government granted charters permitting institutions to conduct business as savings associations and savings banks, *i.e.*, institutions whose charters traditionally required or encouraged longer term deposits than conventional banks and greater investment in home mortgages and related loans.[2] Before FIRREA, state chartered savings associations were authorized, but not required, to obtain federal insurance of their deposit accounts from the Federal Savings and Loan Insurance Corporation (FSLIC) pursuant to Title IV of the National Housing Act, 12 U.S.C. §§ 1724-1730i (repealed 1989). The FSLIC was a federal agency under the direction of the Federal Home Loan Bank Board (FHLBB), 12 U.S.C. § 1725(a) (repealed 1989), which promulgated regulations on behalf of the FSLIC. State chartered savings associations that obtained FSLIC insurance of deposits became subject to a degree of federal regulation.

In contrast to state chartered savings associations, federally chartered savings associations before FIRREA were chartered and regulated by the FHLBB under the Home Owners' Loan Act of 1933 (HOLA). 12 U.S.C. §§ 1461-1470 (1988). These institutions were required to have federal deposit insurance, generally through the FSLIC. 12 U.S.C. § 1726(a) (repealed 1989).[3] By virtue of their federal charters, federal savings associations were subject to greater regulation by the FHLBB of their lending, investment, deposit-taking, branching and general business operations than were state chartered institutions. *See, e.g.*, 12 C.F.R. §§ 545.1-.142 (1989). These savings associations

[2] In the interest of brevity, the term "savings association" used throughout the rest of this brief will include both savings associations and savings banks.

[3] An exception not relevant here allowed certain institutions that had converted from state to federal charters to retain the FDIC insurance they held when they operated under state charters. *See* 12 U.S.C. § 1464(o) (1988); § 1726(a) (repealed 1989).

were also subject to the regulations governing all FSLIC-insured institutions.

In the event of receivership of any FSLIC-insured depository institution before FIRREA, the FSLIC was required to be appointed receiver of a federal savings association, 12 U.S.C. § 1464(d) (1988), and under most circumstances generally could be appointed receiver of a state chartered savings association as well, 12 U.S.C. § 1729(c) (repealed 1989).

FIRREA abolished both the FSLIC and the FHLBB. FIRREA § 401(a), 103 Stat. at 354. After FIRREA, the deposits of all federally insured savings associations, whether chartered under state or federal law, became insured by the FDIC. 12 U.S.C. §§ 1814, 1815. FIRREA created the Office of Thrift Supervision (OTS) within the Department of the Treasury, 12 U.S.C. § 1462a, and gave the Director of OTS authority to charter and regulate federal savings associations. 12 U.S.C. §§ 1463(a), 1464(a). The OTS also was granted direct statutory responsibility to regulate certain aspects of the operations of all savings associations, whether chartered under state or federal law, including in particular, their compliance with required capital and liquidity levels. 12 U.S.C. §§ 1464(t), 1465.

In the event of receivership, FIRREA required the RTC to be appointed receiver of any savings association, whether chartered under state or federal law, until the termination of the RTC on December 31, 1995. Since that time, the FDIC has been required to be appointed such receiver. *See* 12 U.S.C. §§ 1441a(b)(3), 1464(d)(2)(E)(ii). FIRREA also enacted provisions expanding upon the authority of the RTC and FDIC as receiver beyond the authority previously contained in the applicable statutes relating to the FDIC, including through the enactment of § 1821(k). 12 U.S.C. § 1821.

2. The Proceedings Below

Petitioner, John W. Atherton, Jr., was a former director and officer of City Federal Savings Bank (City Federal), a federally

chartered, federally insured savings bank that was headquartered in Bedminster, New Jersey. City Federal was declared insolvent by the OTS in December 1989, at which time the RTC was appointed as receiver of City Federal. (First Am. Compl. ¶¶ 5, 6, 14.)

The RTC, in its capacity as receiver of City Federal and for City Federal's successors in receivership and conservatorship, brought this civil action for money damages against petitioner and other former directors and/or officers of City Federal in 1993. The RTC alleged that petitioner and the other former City Federal directors and officers were liable for breaching their duty of care in connection with losses incurred by City Federal on three real estate acquisition, development and construction loans City Federal made in the mid-1980s. The loans went into default in the late 1980s during the nationwide collapse of the commercial real estate market. The RTC did not assert that any of the defendants engaged in any fraud, self dealing, conflict of interest, unjust enrichment or other breach of their duty of loyalty. Rather, the RTC claimed only that the defendants failed to discharge properly their duty of care as directors and officers of City Federal in connection with their consideration, approval and oversight of the three subject loans. (*Id.* ¶¶ 70-72.)

The RTC's original complaint, filed in April 1993, and its first amended complaint, filed two months later, alleged in a single count claims for negligence, gross negligence and breach of fiduciary duty under both state and federal common law. (*Id.* ¶¶ 71-72.) Neither pleading asserted any claim against the defendants predicated on the statutory standard of liability contained in § 1821(k).

Petitioner and other defendants below moved to dismiss the RTC's first amended complaint on grounds that § 1821(k) established gross negligence as the exclusive standard of liability in suits against former directors and officers of failed federally chartered depository institutions. The RTC chose to concede that state law was not applicable because City Federal was a federally chartered institution. However, the RTC argued that

the last sentence of § 1821(k), the so-called "savings clause," preserved the right for the RTC to proceed against the defendants under "federal common law," which the RTC asserted establishes an "ordinary" or "simple" negligence standard of liability.

On November 15, 1993, the district court granted the defendants' motions and dismissed the RTC's first amended complaint to the extent it alleged claims based other than upon § 1821(k). (Pet. App. A58-A64.) The district court held that § 1821(k) established a uniform federal gross negligence standard of liability in cases involving federally chartered institutions and displaced any claims under federal common law. (*Id.* at A62-A64.) The district court also held that the RTC had withdrawn its state law claims. (*Id.* at A64.)

The RTC then filed a second amended complaint that asserted claims against the defendants based solely on § 1821(k). The RTC also moved to certify the district court's ruling on the standard of liability issue for immediate appeal to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1292(b). The district court granted the RTC's motion (*id.* at A65), and, on May 18, 1994, the court of appeals granted the RTC's request for permission to appeal (*id.* at A68). In its appeal, the RTC did not challenge or seek review of the district court's ruling that the RTC had withdrawn its state law claims.

On June 23, 1995, a divided panel of the court of appeals reversed the district court. 57 F.3d 1231, Pet. App. A1-A50. The majority opinion states:

> We hold that Congress [in enacting Section 1821(k)] did not . . . supplant federal common law holding directors and officers liable for conduct less culpable than gross negligence. . . . [W]e will reverse the district court's order and direct the court to permit the RTC to pursue any claims for negligence or breach of fiduciary duty available as a matter of federal common law.

57 F.3d at 1249, Pet. App. A37 (footnote omitted). The majority opinion, 57 F.3d at 1244, Pet. App. A27-A28, purports to follow the Court's instruction in *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), that the dispositive question regarding whether Congress has displaced a federal common law claim is "whether the legislative scheme 'spoke directly to a question' [previously addressed by federal common law]," *id.* at 315 (paraphrasing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). The majority, however, immediately proceeds to disregard entirely the first sentence of § 1821(k), establishing a gross negligence standard, and concludes that Congress evidenced a clear intent to preserve any pre-existing federal common law claim for simple negligence based solely upon the majority's reading, in isolation, of the last sentence of § 1821(k), the "savings clause." *Id.* at 1237-38, 1245, Pet. App. A27-30, A37.

The savings clause states that "[n]othing in this paragraph shall impair or affect any right of the Corporation under other applicable law." 12 U.S.C. § 1821(k). It follows, however, the first sentence of § 1821(k), which states in pertinent part that "[a] director or officer of an insured depository institution may be held personally liable . . . in any civil action by . . . the Corporation . . . for gross negligence, including . . . conduct that demonstrates a greater disregard of a duty of care (than gross negligence) . . . ." *Id.* The Third Circuit majority reads the savings clause, without regard to the preceding sentence of § 1821(k), as preserving for the RTC the right to assert claims against directors and officers of federally chartered depository institutions under federal common law. 57 F.3d at 1245, Pet. App. A37.

The majority purports to find support for its interpretation of the savings clause in the legislative history of FIRREA. *Id.* at 1238-42, 1245, Pet. App. A28-33, A37. The majority concludes that, in adopting § 1821(k), Congress intended to do no more than preempt so-called "insulating" statutes that had been enacted by various states in recent years and that established a higher standard of care than gross negligence, *e.g.*, intentional

misconduct, for directors and officers of depository institutions chartered in those states. *Id.* at 1242, Pet. App. A31.

To avoid the inevitable conclusion that in the first sentence of § 1821(k) Congress "spoke directly" to the standard of liability issue regarding officers and directors of federally chartered institutions, the majority, based on its aforementioned reading of the statute's legislative history, concludes "that Congress did not intend § 1821(k) to apply to federally-chartered depository institutions" and that "the RTC *cannot* proceed under § 1821(k) in the City Federal action." *Id.* at 1249 n.17, Pet. App. A37 (emphasis in original).

The majority assumes that there existed prior to FIRREA a federal common law claim against directors and officers of federally chartered institutions derived from *Briggs v. Spaulding*, 141 U.S. 132 (1891), and its progeny, but leaves it to the district court to decide whether such claim is for simple negligence or gross negligence. 57 F.3d at 1247, n.16, Pet. App. A32.

In a forceful opinion concurring in part[4] and dissenting in relevant part, Circuit Judge Mansmann argues that the majority's conclusion conflicts with the plain language of § 1821(k). 57 F.3d at 1249-55, Pet. App. A38-A44 (Mansmann, J., concurring in part and dissenting in relevant part). Judge Mansmann observes that § 1821(k), by its clear terms, applies to every "insured depository institution," a term defined in 12 U.S.C. § 1813(c)(2) to include all depository institutions, whether federally or state chartered, the deposits of which are insured by the FDIC. 57 F.3d at 1251, Pet. App. A40.

Citing this Court's decision in *City of Milwaukee*, 451 U.S. 304, Judge Mansmann concludes that Congress "spoke directly" to the issue of the standard of liability for directors and officers of federally chartered depository institutions when Congress enacted § 1821(k). *Id.* at 1252, Pet. App. A44. As a result, Judge Mansmann states that she would have held, as the Fifth, Sixth, Seventh and Tenth Circuits have previously held, that federal common law "must yield" to § 1821(k) in cases such as this. *Id.* at 1249, Pet. App. A38.

Following the decision by the court of appeals, petitioner and other defendants below sought rehearing, with a suggestion of a rehearing *en banc*. The court of appeals denied the petition for rehearing on September 14, 1995. Pet. App. A55-A56. Since the filing of the petition for a writ of certiorari on December 12, 1995, five of the six original petitioners have settled with the RTC, or the FDIC as the RTC's successor, and have withdrawn as petitioners, leaving John W. Atherton, Jr., as the sole remaining petitioner.

[4] In the court of appeals, this case was consolidated with *RTC v. Schuster*, a case involving claims by the RTC as receiver of United Savings and Loan of Trenton, New Jersey (United Savings), against former directors and officers of United Savings. 57 F.3d at 1234-35, Pet. App. A7-A9. United Savings was a state chartered depository institution, and the RTC sued the defendants in *Schuster* for negligence and breach of fiduciary duty under New Jersey law. *Id.* The defendants in *Schuster* filed a motion for dismissal and summary judgment as to the RTC's claims on grounds that § 1821(k) preempted the RTC's state law claims. *Id.* The district court in *Schuster* denied the motion, holding that § 1821(k) did not preempt the state law claims, and the Third Circuit panel, including Judge Mansmann, unanimously affirmed the district court. *Id.* To petitioner's knowledge, the defendants in *Schuster* did not file a petition for a writ of certiorari regarding the circuit court's ruling in that case. In this case, whether the savings clause preempts state law claims is not an issue. As noted above, in the district court below, the RTC chose to withdraw the state law claims it had

(footnote continues)

(footnote continued)

asserted against the petitioner and the other defendants in this case. The district court ruled that the RTC had withdrawn its state law claims (Pet. App. A64), and the RTC did not appeal from that ruling.

SUMMARY OF ARGUMENT

I. Because federal common law is always "subject to the paramount authority of Congress," *New Jersey v. New York*, 283 U.S. 336, 348 (1938), the determinative question regarding whether a congressional statute displaces a pre-existing federal common law rule is "whether [Congress] 'spoke directly to [the] question' " previously governed by such rule. *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981) (paraphrasing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). In § 1821(k), Congress "spoke directly" to the applicable standard of liability in suits by the RTC against the directors and officers of failed federally chartered savings associations. Thus, § 1821(k) provides that directors and officers of "insured depository institution[s]" — a statutory term defined to include both federally chartered and state chartered savings associations such as City Federal — shall be liable for "gross negligence, including . . . conduct that demonstrates a greater disregard of duty of care (than gross negligence) . . . ." There is no legitimate basis for federal judges to decide that directors and officers of federally chartered depository institutions should be liable under a purported pre-existing federal common law simple negligence standard when Congress has provided in § 1821(k) that they may be liable for gross negligence or *greater* disregard of a duty of care.

Four federal courts of appeals have decided that § 1821(k) supplants any pre-existing federal common law simple negligence standard. *RTC v. Frates*, 52 F.3d 295, 297 (10th Cir. 1995); *FDIC v. Bates*, 42 F.3d 369, 373 (6th Cir. 1994); *RTC v. Miramon*, 22 F.3d 1357, 1364 (5th Cir. 1994); *RTC v. Gallagher*, 10 F.3d 416, 424 (7th Cir. 1993). Only the Third Circuit majority concludes otherwise based upon its reading of the savings clause of § 1821(k). The majority interprets the phrase "other applicable law" in the savings clause to embrace "*all*" applicable law, including any pre-existing federal common law claims for simple negligence. 57 F.3d at 1237-38, 1245, Pet. App. A28-31, A37

(emphasis in original). The majority's position is fatally defective for two overriding reasons.

First, in the process of violating elementary rules of statutory construction, the majority renders the substantive provision of § 1821(k), articulating the gross negligence standard, a nullity insofar as federally chartered institutions are concerned. It defies reason that Congress, in the first sentence of § 1821(k), would authorize a statutory cause of action for gross negligence *or greater* against federally chartered institutions "and in the next sentence to eviscerate that standard by allowing actions under federal common law for simple negligence." *Gallagher*, 10 F.3d at 420. In an apparent attempt to avoid the incongruity of this result, the majority adopts the wholly untenable position that § 1821(k) simply does not apply to federally chartered institutions. That conclusion, however, was too much even for the respondent to accept. It concedes that § 1821(k) clearly applies to federally chartered institutions. *See* Br. for the Resp. in Opp. at 12.

Second, in addition to misreading the plain wording and meaning of § 1821(k), the Third Circuit majority also mischaracterizes the legislative history of that provision. According to the majority, § 1821(k) had but a single purpose, to wit, to preempt state "insulating" statutes that exonerated directors and officers from liability even for conduct that was grossly negligent. 57 F.3d at 1242, Pet. App. A30. The legislative history clearly establishes, however, that Congress had more than one concern in enacting § 1821(k). Overcoming the effect of state insulating statutes was one such concern. Respect for federalism principles was another concern, which caused Congress not to seek to preempt state laws that allowed directors and officers to be sued for simple negligence. But undeniably a third concern of Congress that informed § 1821(k) was Congress's understanding that imposing too strict a federal liability standard on directors and officers would discourage qualified individuals from serving

as such in the financial institution industry. Accordingly, in drafting § 1821(k), Congress sought to address each of these concerns: by permitting the RTC to sue for simple negligence in those states that allowed such suits, by allowing it to sue for gross negligence in those states that had adopted "insulating" statutes, and by allowing it to sue for gross negligence in the case of any federally chartered savings association.

II. In any event, there is no federal common law standard of liability that the federal courts may properly apply to the conduct of directors and officers of federally chartered savings associations because none of the extraordinary circumstances that justify the application of federal common law are present here. Such circumstances exist only when there is " 'a significant conflict between some federal policy or interest and the use of state law.' " *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2055 (1994) (quoting *Wallis v. Pan Am. Petrol. Corp.*, 384 U.S. 63, 68 (1966)). No such "significant conflict" is present here. Thus, no "rights of the United States arising under nationwide federal programs," *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979), are at issue. *O'Melveny,* 114 S. Ct. at 2055. Nor has Congress anywhere authorized federal courts to apply any federal common law standards of liability to the directors and officers of federally chartered depository institutions. Moreover, because the governing statute for federal savings associations not in receivership, HOLA, is comprehensive, but does not even tangentially touch on the subject of director or officer liability, there is no basis for the interstitial use of federal common law in this case. As the Court made clear in *O'Melveny*: "Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." 114 S. Ct. at 2054.

The fact that City Federal was federally chartered does not justify the application of any uniform federal common law standard in determining the liability of its directors and officers. A federal charter does not create a need for uniformity regarding

an issue that falls squarely within two traditional areas of state law (torts and corporation law). This is particularly so here, where, in the context of a comprehensive legislative scheme, Congress in § 1821(k) voiced its preference for the use of "applicable State law" to define "gross negligence." Congress thereby clearly evidenced its view that there does not exist any overriding federal policy in favor of a uniform federal standard of liability, except to the extent expressly provided for in § 1821(k). *See Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, 209 (1946) (where part of regulatory scheme relies on state law, "assumption" that uniformity is necessary cannot be made).

Nothing in the Court's earlier decisions in *Briggs v. Spaulding*, 141 U.S. 132 (1891), or *Bowerman v. Hamner*, 250 U.S. 504 (1919), requires a different conclusion. Those decisions, which respondent claims established a federal common law simple negligence standard for the directors and officers of depository institutions, were decided long before *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), which declared that "[t]here is no federal general common law," a principle reaffirmed in *O'Melveny*, 114 S. Ct. at 2053. Moreover, there has been no consensus in the federal courts that *Briggs* or *Bowerman* establish a simple negligence standard. Indeed, the respondent in this very case admits that "[t]he content of the federal common law standard . . . is not clearly established." Br. for the Resp. in Opp. at 16-17. Accordingly, it cannot plausibly be argued that federal common law should be applied to the directors and officers of federally chartered institutions to assure that the liability standards for all such directors and officers will be uniform. It never has been.

Despite several lower court cases holding the contrary, the internal affairs doctrine, which provides that the law of the state of incorporation normally determines issues relating to the internal affairs of a corporation, has no application here. Not only is the doctrine a conflict of laws principle that properly applies only where a choice must be made between the laws of two or more states, *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982), application

of the doctrine to the liability of directors and officers of federally chartered associations is inconsistent with *O'Melveny*, as a number of recent federal court cases have recognized.

For the foregoing reasons, as explained in further detail hereafter, petitioner respectfully submits that the only claims that the RTC or FDIC should be able to assert against the directors and officers of failed federally chartered savings associations are (1) claims for gross negligence under § 1821(k), or (2) claims for simple negligence under state law if the applicable state recognizes such claims.[5]

ARGUMENT

I. THE GROSS NEGLIGENCE STANDARD OF § 1821(k) DISPLACES ANY PRE-EXISTING FEDERAL COMMON LAW SIMPLE NEGLIGENCE STANDARD

As shown in Part II of this brief, no federal common law negligence claim lay against the petitioner even before, much less after, the adoption of FIRREA. The Court does not have to make that determination, however, because, in any event, the gross negligence standard of § 1821(k) displaces any pre-existing federal common law simple negligence standard. The courts of appeals for the Fifth, Sixth, Seventh and Tenth circuits, correctly applying long-established precedents of this Court, have so ruled in unanimous opinions. *RTC v. Frates*, 52 F.3d 295, 297 (10th Cir. 1995); *FDIC v. Bates*, 42 F.3d 369, 373 (6th Cir. 1994); *RTC v. Miramon*, 22 F.3d 1357, 1364 (5th Cir. 1994); *RTC v. Gallagher*, 10 F.3d 416, 424 (7th Cir. 1993). At the circuit court level, only the divided Third Circuit decision under review herein has reached a contrary conclusion.

[5] In this case, of course, the RTC's state law claims have been withdrawn, so it may proceed only under § 1821(k).

A. When Congress "Speaks Directly" To An Issue Previously Governed By Federal Common Law, That Common Law Is Displaced

This Court has "always recognized that federal common law is 'subject to the paramount authority of Congress.' " *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)). Because of federalism concerns, "the appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law." *Id.* at 316. When considering state law preemption, this Court assumes "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (internal quotation marks omitted). By contrast, when the question is whether congressional legislation displaces federal common law, "[s]uch concerns are not implicated in the same fashion . . . , and accordingly the same sort of evidence of a clear and manifest purpose is not required." *Id.* at 316-17. The Court assumes "that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Id.* at 317.

Congress has enacted an extensive series of statutory provisions applicable to federally chartered savings associations and to the RTC (and FDIC) as receiver of such savings associations. *See, e.g.*, 12 U.S.C. §§ 1461-1468c, 1811-1834b. Under this statutory scheme, first the FHLBB, and since the adoption of FIRREA, the OTS, were granted "plenary authority" by Congress to regulate the operations of federally chartered savings associations. 12 U.S.C. § 1464(a); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 144 (1982). This "comprehensive program" of statutory provisions by itself "strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." *City of Milwaukee*, 451 U.S. at 319.

The Third Circuit majority "reject[s]" the argument that any federal common law standard of director and officer liability

"was supplanted because of the scope of FIRREA." 57 F.3d at 1247, Pet. App. A33. The majority argues that in *City of Milwaukee*, express language in the subject act's legislative history demonstrated the establishment of a "comprehensive program," but that no such language exists in FIRREA itself or in its legislative history. *Id.* The majority overlooks its own description of FIRREA as "a massive 371-page legislative package," *id.* at 1239, the legislative history of FIRREA stating that the statute's delineation of RTC rights as receiver is "comprehensive," H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. I, at 415 (1989), and this Court's description of FIRREA as "comprehensive legislation," *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2054 (1994).

More fundamentally, Congress does not have to "address every issue" of an area previously governed by federal common law, *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), nor must it have "affirmatively proscribed the use of federal common law," to abrogate its application. *City of Milwaukee*, 451 U.S. at 315; *accord United States v. Texas*, 507 U.S. 529, 534 (1993); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108-109 (1991) (there is no requirement of "clear statement" or "strict construction"). Rather, whenever Congress "speak[s] directly" to the matter previously addressed by federal common law, such federal common law is displaced. *Texas*, 507 U.S. at 534; *City of Milwaukee*, 451 U.S. at 315; *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 n.34 (1981); *Mobil Oil*, 436 U.S. at 625. Congress did just that in § 1821(k).[6]

[6] The "speak directly" test is satisfied by the "natural meaning" of a statutory provision, *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952), by a statutory listing of powers that omits the power claimed to exist under the common law, *id.* at 789, by a statutory provision that would be rendered "superfluous" by continued application of a common law rule, *Astoria*, 501 U.S. at 112, or by an "implication" after application of the traditional tools of statutory interpretation, *id.* at 110. Each of these is present here. *See infra* pp. 17-21.

B. In § 1821(k), Congress "Spoke Directly" To The Issue Of The Standard Of Liability Applicable To Directors And Officers Of Federally Chartered Depository Institutions

In determining whether Congress "spoke directly" to the standard of liability that governs suits brought by the RTC against officers and directors of failed federally chartered depository institutions in § 1821(k), the guiding principle is that "[t]he starting point for the interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' " *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Section 1821(k) is in two parts: a substantive provision contained in the first sentence of § 1821(k) and a so-called "savings clause" set forth in the second sentence. In its first sentence, § 1821(k) provides in pertinent part that

> [a] director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by . . . the Corporation[7] . . . acting as conservator or receiver of such institution, . . . for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a

[7] The term "Corporation" as used in § 1821(k) refers to the FDIC. 12 U.S.C. § 1811(a) (1994). While § 1821(k) by its terms applies only to actions brought by the FDIC as conservator or receiver of failed insured depository institutions, the RTC is vested with "the same powers and rights to carry out its duties with respect to institutions [for which it is appointed conservator or receiver] as the [FDIC] has under" § 1821(k) and other sections of the Federal Deposit Insurance Act. 12 U.S.C. § 1441a(b)(4)(A) (1994).

duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law.

The savings clause provides that "[n]othing in this paragraph shall impair or affect any right of the Corporation under other applicable law."

The first sentence of § 1821(k) "speak[s] directly," and with unmistakable clarity, to the standard of liability that governs civil actions such as this one, *i.e.*, money damage suits by the RTC against the directors and officers of failed federally insured depository institutions.[8] It provides that directors and officers "may be held personally liable . . . for gross negligence, including . . . conduct that demonstrates a *greater* disregard of a duty of care (than gross negligence) . . . ." (emphasis added). While not explicitly stating that directors and officers may *not* also be found liable for simple negligence, that conclusion flows inexorably from the plain wording of the first sentence of § 1821(k); otherwise there would have been no reason for Congress to specify that directors and officers may be liable for gross negligence "*including* . . . conduct that demonstrates a *greater* disregard of a duty of care (than gross negligence)." *Id.* (emphasis added).

In its brief opposing the petition for certiorari, the FDIC argues that if the first sentence of § 1821(k) were intended to restrict the RTC from suing for simple negligence, "it would most naturally have provided that the [RTC] 'may (and may only)' sue for gross (or greater) negligence." Br. for the Resp. in Opp. at 9. But the use of the additional words "and may only" would have been entirely superfluous. By providing that directors and officers may be liable for "gross negligence, including . . . conduct that demonstrates a *greater* disregard of a duty of

[8] As will be discussed, *infra* pp. 22-25, and contrary to the holding of the majority below, it is indisputable that the first sentence of § 1821(k) applies to both federal and state chartered "insured depository institution[s]," and the FDIC has so conceded, *see* Br. for the Resp. in Opp. at 12.

care" (emphasis added), it was unnecessary to add that they may not be liable for conduct demonstrating a *lesser* disregard of a duty of care.

Because the substantive provision of § 1821(k) "speak[s] directly" to the question previously addressed by a purported body of federal common law, namely, the appropriate liability standard to be applied in suits brought by the RTC against directors and officers of failed federally insured depository institutions, any such preexisting federal common law standard is displaced. *Texas*, 507 U.S. at 534; *Astoria*, 501 U.S. at 108; *City of Milwaukee*, 451 U.S. at 315; *Northwest Airlines*, 451 U.S. at 95 n.34; *Mobil Oil*, 436 U.S. at 625. There is no legitimate basis for federal judges to decide that directors and officers should be liable, under federal common law, for simple negligence when Congress has provided, as a matter of federal statutory law, that they should be liable for gross negligence or greater. As the Fifth Circuit accurately observed in *RTC v. Miramon*, "It is difficult to conceive how Congress could more clearly 'speak directly' to the issue of the standard of care for personal liability of directors and officers of federally-insured depository institutions." 22 F.3d 1357, 1361 (5th Cir. 1994). *See also RTC v. Gallagher*, 10 F.3d 416, 420 (7th Cir. 1993) ("It is hard to imagine a more definitive statement by Congress that a gross negligence standard of liability applies to cases brought by the RTC against officers and directors of failed financial institutions.").

The majority opinion correctly identifies " 'the language of the statute itself' " as the appropriate " 'starting point' " for interpreting whether § 1821(k) displaces any preexisting federal common law claim for simple negligence. 57 F.3d at 1237, Pet. App. A13 (quoting *Kaiser Aluminum*, 494 U.S. at 835). Rather than proceeding to read § 1821(k) in its entirety, however, the majority opinion instead completely disregards the first, substantive provision of the statute, and asserts that "[t]he disposition of these appeals turns on the breadth of § 1821(k)'s last sentence," the so-called "savings clause." *Id.* As noted above, that clause provides that "[n]othing in this paragraph shall impair or affect

any right of the Corporation under other applicable law." 12 U.S.C. § 1821(k). According to the majority, the savings clause, read in isolation, manifests Congress's intent to preserve the RTC's ability to seek recovery from directors and officers under all "other applicable law" including federal common law.[9]

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[9] The majority opinion predicates its reading of the savings clause on two arguments: (1) elsewhere in FIRREA, when Congress wanted to limit its reference to the laws of a particular jurisdiction, it did so with specific language; and (2) the majority's reading of the savings clause is consistent with this Court's decision in *Patterson v. Shumate*, 504 U.S. 753, 759 (1992), where the phrase "applicable nonbankruptcy law" was interpreted to encompass "any relevant nonbankruptcy law, including federal law such as ERISA." 57 F.3d at 1238, Pet. App. A14. The Court in *Patterson*, however, noted that "the plain language of the [statute] is our determinant," 504 U.S. at 757, and found in that case that no other language in the subject statute suggested that the phrase "applicable nonbankruptcy law" referred only to state laws, *id.* at 758. In the absence of any such other language, the Court in *Patterson* found corroborative support for a broad reading of the phrase at issue in the fact that elsewhere in that statute Congress had expressly referenced state law when it sought to so limit the scope of applicable laws. *Id.* at 758-59. *Patterson* might be an apt precedent for the majority's reliance on other provisions in FIRREA expressly referencing state law if the savings clause of § 1821(k) is read in total isolation, as the majority in fact reads it. But the savings clause does not constitute all of § 1821(k); rather, it follows the first sentence of that section, and its scope must be informed by the plain meaning of the language used in that first sentence, *see United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 n.5 (1989) (courts should not read bankruptcy statute "in an unnatural way . . . that is inconsistent with the remainder" of the statute). Because the first sentence of § 1821(k) "speak[s] directly" to the issue of the standard of liability applicable to directors and officers of federally chartered depository institutions, any pre-existing federal common law standard is displaced. *See City of Milwaukee*, 451 U.S. at 315-16. Thus, unlike the statute in *Patterson*, § 1821(k) does contain specific language that "suggests that the phrase ['other applicable laws'] refers . . . exclusively to *state* law." 504 U.S. at 758 (emphasis in original). Under these circumstances, the fact that elsewhere in FIRREA Congress refers expressly to state laws is not sufficient to override Congress's clear displacement of federal common law by virtue of having "spoke[n] directly" to the issue of director and officer liability in § 1821(k) itself. Long-established rules of statutory construction

(footnote continues)

57 F.3d at 1237, Pet. App. A13. In so ruling, however, the majority effectively renders the first sentence of § 1821(k) a nullity, at least insofar as federally chartered institutions (which allegedly are subject to federal common law) are concerned.

If the majority's reading of the savings clause is adopted, it perforce leads to the conclusion that by enacting § 1821(k), Congress gave the RTC a choice: the RTC could sue a director or officer of a failed federally chartered depository institution for gross negligence under the first sentence of § 1821(k) or, alternatively, by virtue of the savings clause, the RTC could sue for simple negligence under federal common law. But offering the RTC this election would be nonsensical. As the Fifth Circuit so cogently remarked in *Miramon*, "Why would the RTC ever bring an action under section 1821(k), where it would have to prove gross negligence, when it could bring an action under the federal common law and only be required to prove simple negligence?" 22 F.3d at 1361. *See also Gallagher*, 10 F.3d at 420 ("It is illogical that Congress intended in one sentence to establish a gross negligence standard of liability and in the next sentence to eviscerate that standard by allowing actions under federal common law for simple negligence."); *FDIC v. Bates*, 42 F.3d 369, 372 (6th Cir. 1994) ("If the court reads the savings clause to preserve simple negligence claims, then the gross negligence standard explicitly articulated in the savings clause is redundant, meaningless surplusage."). It is, of course, an " 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.' " *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979)). *See also Astoria*, 501 U.S. at

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(footnote continued)

require courts to read statutes in a manner that affords internal consistency, *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986), avoids rendering superfluous any parts thereof, *Astoria*, 501 U.S. at 112; *United States v. Menasche*, 348 U.S. 528, 538-39 (1955), and recognizes that specific language controls general language, *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932).

112 ("[W]e construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.").

C. Section 1821(k) Clearly Applies To Federally Chartered Depository Institutions Such As City Federal

If it had been Congress's intent that the directors and officers of federally chartered depository institutions should be liable for simple negligence under pre-existing federal common law — and, therefore, its intent that federal common law be embraced within the phrase "other applicable law" in the savings clause — then Congress could have achieved that result in at least two different ways: (1) merely by excluding federally chartered institutions from the coverage of § 1821(k) or (2) by drafting a savings clause that expressly preserved "federal common law" claims, as it has done in other comprehensive federal statutory schemes.[10] The Third Circuit majority, apparently cognizant of at least the first alternative, and in an attempt both to side-step the "speak directly" test and to achieve logical consistency between the first sentence of § 1821(k) and the majority's expansive interpretation of the savings clause, baldly declares that § 1821(k) does not apply to federally chartered depository institutions. The majority thus states, "Congress did not intend to address the liability standards applicable to directors and officers of federally chartered institutions in enacting § 1821(k),

[10] *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9608(d)(2) (1994) ("Nothing in this subsection shall be construed to limit any other State or Federal statutory, contractual, or common law liability of a guarantor . . . ."); Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11046(g) (1994) ("Nothing in this section shall restrict or expand any right which any person (or class of persons) may have under any Federal or State statute or common law to seek enforcement of any requirement or to seek any other relief . . . ."); Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. § 6991b(d)(3) (1994) ("Nothing in this subsection shall be construed to limit any other State or Federal statutory, contractual or common law liability of a guarantor . . . ."); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6924(t)(3) (1994) (same).

but rather enacted the provision for the purpose of preempting state insulating statutes." 57 F.3d at 1246, Pet. App. A31.

According to the majority, § 1821(k) was "a reaction to the enactment by various states, during the middle and late 1980s, of lenient director liability statutes that protected directors from gross negligence claims by limiting their liability to instances of reckless, willful and wanton boardroom misconduct." *Id.* at 1239, Pet. App. A16. Thus, according to the majority, Congress's sole purpose in enacting § 1821(k) was to permit the RTC, when suing the directors or officers of a state chartered institution, to proceed under the gross negligence standard of § 1821(k) in those states that had enacted insulating statutes and, as permitted by the savings clause, to proceed under simple negligence standards in those states that had not enacted insulating statutes and otherwise followed simple negligence standards. *Id.* at 1242, Pet. App. A34 ("[T]he legislative history [of Section 1821(k)] reflects an effort to ensure that directors and officers of state-chartered institutions . . . not escape liability to the RTC under the shield of certain state laws that had effectively insulated them even from claims based on their grossly negligent or reckless conduct.").

The majority's position suffers from two fatal defects: (1) it ignores and is at odds with the plain meaning of the terms used in § 1821(k) as defined elsewhere in FIRREA; and (2) it erroneously concludes that Congress had only one purpose in mind (preempting state insulating statutes) in adopting § 1821(k).

The first fatal flaw in the Third Circuit majority's position, as Judge Mansmann's dissent correctly recognizes, 57 F.3d at 1251, Pet. App. A41-A42, is that § 1821(k), by its own terms, quite evidently is intended to apply to RTC suits against directors and officers of federally chartered institutions as well as those of state chartered institutions. Thus, § 1821(k) provides that the RTC may bring an action against a director or officer of an "insured depository institution." The term "insured depository institution" is defined in FIRREA as "any bank or savings association the deposits of which are insured by the [FDIC]."

12 U.S.C. § 1813(c)(2). The term "savings association" is defined in FIRREA to include "any Federal savings association" and "any State savings association." 12 U.S.C. § 1813(b)(1)(A), (B). The term "Federal savings association" is defined to include "any Federal savings association or Federal savings bank which is chartered under [12 U.S.C. § 1464]." 12 U.S.C § 1813(b)(2).[11] Moreover, the statutory definitions in FIRREA contain separate definitions for "Federal depository institution" and "State depository institution." 12 U.S.C. § 1813(c)(4), (5). The former term is defined to include "any Federal savings association" which, as indicated, is defined as any federally chartered savings association or savings bank. 12 U.S.C. § 1813(c)(4). If, as the Third Circuit majority ruled, Congress intended the gross negligence standard of § 1821(k) to apply only to directors or officers of state chartered institutions, it would have referred in § 1821(k) to insured "State depository institution[s]," not to "insured depository institution[s]," a term that embraces federal as well as state depository institutions. Significantly, in opposing the certiorari petition herein, the FDIC candidly acknowledged the Third Circuit majority's fundamental error. It stated, "We agree with petitioners that [Section 1821(k)] should be read to apply to federally chartered institutions." Br. for the Resp. in Opp. at 12.

Since there is no question but that § 1821(k) applies to federally chartered as well as state chartered institutions, the task of statutory interpretation is to reconcile the first sentence of § 1821(k) with the savings clause so that both are given coherent meanings that are applicable to both types of institutions. *See*

[11] City Federal, whose full name at the time of its receivership in December 1989 was City Federal Savings Bank, was insured by the FDIC and was a federal savings bank chartered under 12 U.S.C. § 1464. (First Am. Compl. ¶ 5.) Therefore, City Federal was clearly a "Federal savings bank" referred to in 12 U.S.C. § 1813(b)(2), a "Federal savings association" as defined in 12 U.S.C. § 1813(b)(2), a "savings association" as defined in 12 U.S.C. § 1813(b)(1)(A), and an "insured depository institution" as defined in 12 U.S.C. § 1813(c)(2) and as used in § 1821(k). Accordingly, § 1821(k) clearly applies to the RTC's suit against petitioner, a former director and officer of City Federal.

Ron Pair, 489 U.S. at 242 n.5. We submit this is achieved by ruling that, in the case of a federally chartered institution, the RTC may sue directors and officers for gross negligence, as the first sentence of § 1821(k) provides, and that the RTC may not alternatively sue them for simple negligence under federal common law because (1) the first sentence of § 1821(k) implicitly precludes a suit for simple negligence under § 1821(k) itself, and (2) the savings clause cannot be read to permit a federal common law simple negligence claim without nullifying the application of the first sentence of § 1821(k) to federally chartered institutions. In the case of a state chartered institution, the first sentence of § 1821(k) can be read to permit the RTC to sue its directors and officers for gross negligence even in those states that have enacted insulating statutes and the savings clause can be read to allow the RTC to sue for simple negligence in those states that have adopted a simple negligence standard.[12]

D. The Legislative History Of § 1821(k) Demonstrates That Congress Intended To Establish A Gross Negligence Federal Standard Of Liability

As noted above, the majority's reading of the legislative history of § 1821(k) also suffers from a fatal defect, *i.e.*, the failure to recognize that the language of the statute reflects a congressional effort to harmonize several competing concerns; it does not reflect a single legislative purpose. A fair reading of all

[12] The above interpretation assumes *arguendo* that a federal common law claim for simple negligence against directors and officers of a federally chartered depository institution existed before FIRREA. As demonstrated in Part II, that is not the case. Rather, the cause of action available to such an institution against its directors and officers prior to the institution's placement into conservatorship or receivership is under state law. Accordingly, the correct reading of the first sentence of § 1821(k) is that in the case of both a federally chartered and a state chartered savings association, the RTC may sue its directors and officers for gross negligence even though the applicable state law would otherwise require a higher standard, and the savings clause should be read as allowing the RTC to sue for simple negligence in those relatively few states that have adopted a simple negligence standard.

the legislative history of § 1821(k) supports the construction of that statute adopted by the Fifth, Sixth, Seventh and Tenth Circuits as well as by Judge Mansmann in her dissent below.

In enacting § 1821(k), Congress had at least three concerns. First, as the majority correctly observes, Congress attributed at least part of the savings and loan debacle of the 1980s to director and officer malfeasance and concluded that state insulating statutes, in those states that had enacted them, stood as an obstacle to recovery even from directors and officers who had been grossly negligent in the performance of their duties. 57 F.3d at 1238-39, Pet. App. A15-A16. Accordingly, one of the purposes of establishing a gross negligence standard in § 1821(k), as explained by the Senate bill's floor manager, Senator Riegle, was to preempt state laws that established a higher duty of care. 135 Cong. Rec. S4278-79 (daily ed. Apr. 19, 1989); *see also RTC v. Miramon,* 22 F.3d 1357, 1363 n.9 (5th Cir. 1994).

In its recitation of the legislative history of § 1821(k), however, the Third Circuit majority simply disregards the fact that there was a second substantial concern that informed the drafting of that provision. While there clearly was a recognition in Congress that state insulating statutes may have gone too far in exonerating grossly negligent directors and officers of failed depository institutions, there undeniably was also a recognition, among legislators and others, that if liability standards were made too stringent, qualified persons would be dissuaded from serving. As one student of the history of § 1821(k) has observed:

> [D]espite the reports of scandalous excesses by individual bank and thrift directors, a number of legislators and financial experts worried that an excessively zealous federal crackdown against directors of depository institutions might ultimately harm the public interest by scaring away from the banks and thrifts some of their most qualified and honest managers — just the sort of leaders who were now most needed to revive and salvage those institutions.

David B. Fischer, *Bank Director Liability Under FIRREA: A New Defense for Directors and Officers of Insolvent Depository Institutions — Or a Tighter Noose?,* 39 UCLA L. Rev. 1703, 1709 (1992) (footnote omitted).[13]

This concern explains, at least in part, why the standard of liability in § 1821(k) was set at gross negligence rather than simple negligence. The Senate's initial bill, reported from the Senate Banking Committee to the full Senate on April 13, 1989, would have allowed the RTC to bring claims not only for "gross negligence" and "willful misconduct" but also for "any cause of action available at common law" including ordinary "negligence." S. 774, 101st Cong., 1st Sess. § 214(n) (1989). Within the week, however, Senators Riegle and Garn introduced a managers' amendment to the bill that eliminated all reference to "any cause of action available at common law" and "negligence." Under the amended language, directors and officers could only be found liable in suits by the RTC for "gross negligence or intentional tortious conduct." 135 Cong. Rec. S4452.

In the course of the floor debate on the managers' amendment, Senator Sanford, a member of the Senate Banking Committee from which the bill originated, made clear that, at least in his mind, the change in the bill from a simple negligence to a gross negligence standard was critical from the perspective of attracting qualified individuals to serve as directors and officers of depository institutions. He stated:

> Mr. President, I would like to thank the distinguished managers of the bill, Senator Riegle and Senator Garn, for including in the managers' amendment modifications to the bill regarding directors and officers liability

[13] *See also Prosecuting Fraud in the Thrift Industry: Hearings on H.R. 1278 Before the Subcomm. On Criminal Justice of the House Comm. On the Judiciary,* 101st Cong., 1st Sess. 98-99 (1989) (testimony of John K.Villa, banking attorney and author); *id.* at 278-79 (testimony of Edward L. Yingling, executive director of government relations, American Bankers' Association).

> insurance contracts, surety bond, and financial institution bond contracts, *and provisions relating to State laws affecting the liability of officers and directors of financial institutions.*
>
> I believe that these changes are essential if we are to attract qualified officers and directors to serve in our financial institutions.

Id. at S4276.

Courts of appeals that have held § 1821(k) displaces federal common law have also read the legislative history of that provision as manifesting a congressional intent, in part, to adopt a liability standard that would not discourage qualified individuals from serving as directors and officers of financial institutions. For example, the Seventh Circuit stated in *RTC v. Gallagher:*

> Congress was aware that the proposed simple negligence standard might make it difficult for financial institutions to attract high quality officers and directors. . . .
>
> . . . Senator Sanford's contemporaneous understanding of the managers' amendment as establishing a federal gross negligence standard of liability necessary to enable financial institutions to attract quality officers and directors supports our interpretation of the plain language of § 1821(k).

10 F.3d 416, 422-23 (7th Cir. 1993). *See also FDIC v. Bates*, 42 F.3d 369, 373 (6th Cir. 1994) ("[C]omments during the debate reflected concern that authorizing a claim under simple negligence would keep qualified people from seeking or retaining positions as officers and directors.").[14]

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[14] The change in the standard of care from simple to gross negligence reflected in part the third concern of Congress regarding § 1821(k), *i.e.*, that Congress not preempt all state laws establishing duties of care for *(footnote continues)*

The Third Circuit majority disputes that § 1821(k) "manifest[s] Congressional intent to adopt a uniform gross negligence standard of care for directors and officers of bankrupt federally insured depository institutions." 57 F.3d at 1242, Pet. App. A23. But it is clear from the Senate floor debate that at least some Senators, including one of the floor managers of the Senate bill, perceived § 1821(k) as establishing a uniform federal standard of care and that such standard was gross negligence. Thus, Senator Garn, one of the bill's managers, stated on April 19, 1989, after the language of the bill had been changed to eliminate reference to ordinary negligence, "*[W]e impose* on directors and officers of [a] federally insured financial institution *a standard of care* they owe to the institution and its shareholders." 135 Cong. Rec. S4281 (daily ed. Apr. 19, 1989) (emphasis added). Senator Roth similarly observed that the amended bill "*sets a standard of care* owed to the financial institution because it is federally insured." *Id.* (emphasis added). Senator Roth added, "I think it is important to point out that *the standard of care imposed* is owed to the institution and its shareholders. . . . [W]e are talking about the *standard of care owed* to an institution that enjoys Federal Deposit Insurance." *Id.* (emphasis added).

The House version of § 1821(k), H.R. 1278, 101st Cong., 1st Sess. § 212(k) (1989), which passed after the Senate version and is the version that eventually became law, preserved the Senate's removal of the simple negligence standard. *See* Pub. L. No. 101-73, § 212(k), 103 Stat. 183, 243 (1989). The House-Senate Conference Report, which represents the final statement of terms agreed upon by both houses of Congress, confirms that

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(footnote continued)

directors and officers. Thus, in introducing the managers' amendment, Senator Riegle explained:

> The reported bill totally preempted State law in this area with respect to suits brought by the FDIC against bank directors or officers. However, in light of the State law implications raised by this provision, the managers' amendment scales back the scope of this preemption.

135 Cong. Rec. S4278-4279.

Congress decided upon a gross negligence standard for § 1821(k):

> Title II preempts State law with respect to claims brought by the FDIC in any capacity against officers or directors of an insured depository institution. The preemption allows the FDIC to pursue claims for gross negligence or any conduct that demonstrates a greater disregard of a duty of care, including intentional tortious conduct.

H.R. Conf. Rep. No. 222, 101st Cong. 1st Sess. 398 (1989), *reprinted in* 1989 U.S.C.C.A.N. 432, 437.

The Third Circuit majority gives far more weight to the report of the Senate Banking Committee (Banking Committee Report), published in the *Congressional Record* on June 19, 1989, than to the House-Senate Conference Report. According to the majority, the Banking Committee Report "makes clear that § 1821(k) did not disturb any claims, available as a matter of state or federal law, that would hold directors and officers liable for conduct less culpable than gross negligence." 57 F.3d at 1241, Pet. App. A20. The Banking Committee Report stated:

> This subsection does not prevent the FDIC from pursuing claims under State law or under other applicable Federal law, if such law permits the officers or directors of a financial institution to be sued (1) for violating a lower standard of care, such as simple negligence, or (2) on an alternative theory such as breach of contract or breach of fiduciary duty.

S. Rep. No. 19, 101st Cong., 1st Sess. 318 (double star print 1989).

The Banking Committee Report is of only limited utility in interpreting congressional intent. *See, e.g., RTC v. Miramon,* 22 F.3d 1357, 1362 (5th Cir. 1994) ("[E]xamination of all of the legislative history, and scrutiny of the sequence of events leading up to the bill's passage, calls into question the conclusion of [the Banking Committee] report."). In the first place, it is not clear

that the authors of the Banking Committee Report, when referring to "other applicable Federal law," had in mind federal common law. They nowhere specifically so state.[15] But even if that is what they intended, their intent was not made clear to the Senate when it voted on and passed the amended bill, S. 774, 101st Cong., 1st Sess. § 214(n) (1989). That vote took place on April 19, 1989, but the Banking Committee Report was not published until two months later, 135 Cong. Rec. S6907, S6934 (daily ed. June 19, 1989). In *Clarke v. Securities Industry Ass'n,* 479 U.S. 388, 407 (1987), the Court refused to "attach substantial weight" to a statement placed in the Congressional Record by a sponsor of an act ten days after the law was passed.

It is true, as the Third Circuit majority points out, that the Banking Committee Report was available some six weeks before § 1821(k) was finally enacted into law in early August 1989. 57 F.3d at 1241, Pet. App. A20. But it is not at all clear, given the timing of its issuance, that the Report accurately reflected the views of the members of the Senate, much less those of House members, when final votes were cast. The House-Senate Conference Report does not suffer from these infirmities and is entitled to greater weight. It nowhere suggests that the RTC may pursue a claim for simple negligence but, on the contrary, indicates that it may "pursue claims for gross negligence or any conduct that demonstrates a greater disregard of a duty of care, including intentional tortious conduct." H.R. Conf. Rep. No. 222 at 398.

Although the legislative history of § 1821(k) is limited and not entirely free from ambiguity, it strongly suggests that Congress intended to limit the liability of directors and officers of depository institutions to gross negligence except, in deference

[15] It is just as likely that "other applicable Federal law" referred to the administrative enforcement provisions of FIRREA, *see, e.g.,* 12 U.S.C. § 1818, and/or to other federal statutes that might be used as a basis for suits against bank officers and directors, *e.g.*, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1994). That is what the court concluded in *Gallagher,* 10 F.3d at 420: "A better reading of the savings clause is that it was drafted to preserve the RTC's ability to take other regulatory actions based on simple negligence."

to principles of federalism, in those cases where a lesser standard of care is imposed under the law of a particular state. Nothing in the legislative history demonstrates that Congress, in enacting the final version of § 1821(k), intended that the directors and officers of federally chartered institutions should be subject to a simple negligence standard under federal common law.

The Court's analysis should begin where *City of Milwaukee*, *Northwest Airlines* and *Mobil Oil* begin, and with what the majority below ignored, the substantive language of § 1821(k). Because § 1821(k) "speak[s] directly" to the standard of liability applicable to directors and officers of federally chartered institutions, and because it imposes a gross negligence standard, it should be deemed to supplant any federal common law simple negligence standard that may have existed before FIRREA. The Court's analysis need proceed no further.

II. IN ANY EVENT, THERE IS NO FEDERAL COMMON LAW CLAIM FOR ORDINARY NEGLIGENCE APPLICABLE TO OFFICERS AND DIRECTORS OF FEDERALLY CHARTERED DEPOSITORY INSTITUTIONS

If this Court should determine that § 1821(k) does not create a gross negligence standard of liability that supplants any pre-existing federal common law simple negligence standard, then, alternatively, we ask the Court to rule that no such federal common law standard existed prior to the adoption of FIRREA, nor does any such standard now exist; rather, the liability of directors and officers of federally chartered depository institutions should be determined as a matter of state law, not federal common law.

A. There Is No Established Federal Common Law Standard Of Liability

Respondent contends that "the federal common law standard of liability for officers and directors of federally chartered depository institutions is ordinary negligence" and relies for that proposition on two decisions of this Court, *Briggs v. Spaulding*, 141 U.S. 132 (1891), and *Bowerman v. Hamner*, 250 U.S. 504 (1919). Br. for the Resp. in Opp. at 17. The Third Circuit majority similarly notes that "the Supreme Court first articulated a common law standard of care for directors and officers of federally chartered depository institutions over 100 years ago in *Briggs* . . . ." 57 F.3d at 1247 n.16, Pet. App. A32.[16]

We dispute that *Briggs* and *Bowerman* intended to create an ordinary negligence liability standard for officers and directors (regardless of whether viewed as a federal or state common law standard). Rather, we believe those cases hold bank directors and officers liable only for gross negligence. In *Briggs*, the Supreme Court considered whether two directors of a federally chartered bank could be held liable for losses caused by unlawful loans made by its officers that the directors failed to discover. In dismissing claims by the bank's receiver, the Court stated, in a passage relied upon by the RTC as establishing a federal common law simple negligence standard of liability, that the "degree of care" required of bank directors "is that which ordinarily prudent and diligent men would exercise under similar circumstances . . . ." *Briggs*, 141 U.S. at 152. But in a subsequent, critical passage, the Court elaborated as follows:

> [W]e hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figure-heads. They are entitled under the law to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrong-doing, if that ignorance is the result of *gross inattention* . . . .

[16] The majority stated, however, that "[g]iven our conclusion that § 1821(k) does not address the liability of directors and officers of federally chartered institutions, we need not discern whether the federal common law standard is one of ordinary or gross negligence." *Id.*

Id. at 165-66 (emphasis added).

In short, "it is evident that the Court [in *Briggs*] was not applying the heightened standard of care simple negligence envisions." *Washington Bancorp. v. Said,* 812 F. Supp. 1256, 1266 (D.D.C. 1993). Similarly, in *Bowerman*, a bank director was held personally liable for bank losses because he never attended a single director's meeting during the bank's entire 5½ year existence, did not exercise even "slight care" in the discharge of his responsibilities, and "deliberately avoided acquiring knowledge of [the bank's] affairs and wholly abdicated the duty of supervision and control which rested upon him as a director." 250 U.S. at 509, 510-11. The Court concluded that "in this case we have the *gross negligence* of the appellant." *Id.* at 511. *See generally* Fischer, 39 UCLA L. Rev. at 1712-26.

B. *O'Melveny* Confirms That There Is No Federal General Common Law

Even if *Briggs* and *Bowerman* did in fact create a simple negligence standard of liability, they no longer settle the issue of whether there is a federal common law ordinary negligence standard upon which the RTC may predicate a claim against the petitioner because those cases were decided well before the Court's decision in *Erie,* which declared that "[t]here is no federal general common law." 304 U.S. at 78.

The *Erie* admonition was recently reaffirmed by a unanimous Court in *O'Melveny & Myers v. FDIC,* 114 S. Ct. 2048 (1994). There, the FDIC as receiver of a failed state chartered, federally insured savings and loan association brought state law causes of action for professional negligence and breach of fiduciary duty against a law firm that had represented the institution. *Id.* at 2052. The law firm moved for summary judgment on grounds that, *inter alia,* under state law, the knowledge of the conduct of the institution's officers must be imputed to the institution and to the FDIC as its receiver, and that, because of the imputed knowledge, the FDIC was estopped from pursuing its claims against the law firm. *Id.* The FDIC countered that a

federal common law rule, not state law, determined the imputation question. *Id.* The Court disagreed. *Id.* at 2052-56. It determined that there was no explicit federal statutory provision that displaced applicable state law, *id.* at 2054; that given the comprehensiveness of FIRREA, there was no justification for creating federal common law exceptions to supplement it, *id.*; and that, apart from FIRREA, the use of state law would not produce a conflict with any identifiable federal policy or interest, *id.* at 2055-56. Accordingly, the Court concluded that "this is not one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted." *Id.* at 2056.

No decision of this Court subsequent to *Erie* has recognized the existence of a federal common law claim for negligence against the directors or officers of any insured depository institution.[17] There have been lower federal court decisions post-*Erie* that have relied on *Briggs* and *Bowerman* to recognize a federal common law claim for breach of the duty of care against directors and officers of federally chartered depository institutions. *See, e.g., FDIC v. Bierman,* 2 F.3d 1424, 1432 (7th Cir. 1993); *FDIC v Appling,* 992 F.2d 1109, 1113-14 (10th Cir. 1993); *Hoehn v. Crews,* 144 F.2d 665, 672 (10th Cir. 1944), *aff'd on other grounds sub nom. Garber v. Crews,* 324 U.S. 200 (1945); *Michelsen v. Penney,* 135 F.2d 409, 419 (2d Cir. 1943); *FDIC v. Mason,* 115 F.2d 548, 551 (3d. Cir 1940); *Atherton v. Anderson,* 99 F.2d 883, 887 (6th Cir. 1938). These cases, however, merely assume that the application of federal common law is appropriate. None engages in the type of analysis that the Court's more recent decisions — particularly *O'Melveny* — have deemed essential before deciding to apply a federal common law rule in lieu of a state law rule.[18]

[17] The Court has cited *Briggs* only once since *Erie,* in a footnote in a dissenting opinion in *Bangor Punta Opers. Inc. v. Bangor & Aroostook R. Co.,* 417 U.S. 703, 721 n.1 (1974) (Marshall, J., dissenting). Since *Erie*, the Court has never cited *Bowerman.*

[18] The Third Circuit majority acknowledged that *Briggs* was decided prior to *Erie*, but citing *Bierman* and *Appling* concluded that "the *Briggs* articulation of the standard of care apparently continues to apply as a matter of federal common law." 57 F.3d at 1247, n.16, Pet. App. A32.

Although, as *O'Melveny* indicates, the creation of federal common law is reserved for "extraordinary cases," 114 S. Ct. at 2056, the Court has recognized the need and authority of federal courts to create federal common law in a "few and restricted" instances, *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). Such instances exist only when there is "a significant conflict between some federal policy or interest and the use of state law." *Wallis v. Pan Am. Petrol. Corp.*, 384 U.S. 63, 68 (1966). As the Court said in *O'Melveny*, "Our cases uniformly require the existence of such a conflict as a precondition for recognition of a federal rule of decision." 114 S. Ct. at 2055. In this way, the court grants proper deference to Congress's paramount authority to promulgate laws and to the requirements of federalism and the Rules of Decision Act, 28 U.S.C. § 1652, that state law be applied unless there is a clear and overriding federal basis for employing a judicially created, contrary federal rule.

Setting aside specialty areas that have no conceivable bearing here,[19] federal common law may be created where (1) "the rights and obligations of the United States" are implicated, *Texas Indus.*, 451 U.S. at 641; (2) there is "some congressional authorization to formulate substantive rules of decision," *id.*; or (3) "rules . . . may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress," *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 160 (1983). None of these rationales for creating a uniform federal common law rule of decision are present here, nor does the fact that this case involves the assertion of claims against a former director and officer of a federally chartered institution otherwise give rise to "a significant conflict between

[19] Federal common law may be created, *inter alia*, in cases that involve "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (footnote omitted).

some federal policy or interest and the use of state law."[20] *Wallis*, 384 U.S. at 68.

C. The Rights And Obligations Of The United States Are Not At Issue In This Case

The rights and obligations of the United States are in no way implicated by this case. In *O'Melveny*, the FDIC cited *United States v. Kimbell Foods*, 440 U.S. 715, 726 (1979), for the proposition that " 'federal law governs questions involving the rights of the United States arising under nationwide federal programs.' " 114 S. Ct. at 2053. The Court made clear, however, that "the FDIC is not the United States, and even if it were we would be begging the question to assume that it was asserting its *own* rights rather than, as receiver, the rights of [the failed institution]." *Id.* (emphasis in original). Similarly, here, the United States is not a party to the case and neither the RTC, nor the FDIC as its successor, is the United States. The RTC instituted suit against petitioner in its capacity as receiver of City Federal and seeks to recover only on behalf of the failed institution, not on behalf of the United States.

[20] The court below stated, "The defendants concede that before receivership City Federal . . . had a right to bring an action against them under federal common law." 57 F.3d at 1245, Pet. App. A28. Petitioner respectfully submits that the court is in error on this point. Petitioner's brief to the Third Circuit expressly argued that the RTC's position regarding the existence of a federal common law simple negligence standard of liability was incorrect because the *Briggs* and *Bowerman* cases upon which such argument was based "were decided long before *Erie*," and do not " 'create a federal common law claim, as opposed to being grounded in a state law claim.' " Br. of Appellees at 21 (quoting *FDIC v. Gonzalez-Gorrondona*, 833 F. Supp. 1545, 1550 (S.D. Fla. 1993)). However, even if the defendants are deemed to have made such a concession below, this Court "is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991).

D. Congress Has Not Authorized The Creation Of A Uniform Federal Common Law Standard Of Liability

Nowhere has Congress, explicitly or even by implication, authorized federal courts to create federal common law causes of action or standards of liability for the directors and officers of federally chartered depository institutions. HOLA is a comprehensive federal statute that governs the activities of federally chartered savings associations that are not in receivership. Nowhere in that statute is there any mention of director or officer liability issues, much less any indication that Congress intended federal courts to create federal rules of decision governing the liability of directors and officers of federally chartered depository institutions. HOLA stands in sharp contrast to federal statutory schemes that specifically provide causes of action and duties of care regarding the conduct of entities and individuals in the context of such schemes.[21] The only federal statute of which we are aware that speaks to the question of the liability of

[21] There are a number of such statutes. For example, the Labor-Management Relations Act, 1947 provides that "suit[s] for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ." 29 U.S.C. § 185(a) (1994). The federal securities laws provide that purchasers of securities from issuers who have made untrue statements of material fact or omitted to state material facts may sue such issuers. Securities Act of 1933, 15 U.S.C. §§ 77k(a), 77*l* (1994); Securities Exchange Act of 1934, 15 U.S.C. § 78j (1994). The Employee Retirement Income Security Act of 1974 (ERISA) provides that an ERISA plan "fiduciary shall discharge his duties with respect to a plan . . . with the care, skill, prudence, and diligence . . . that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . ." 29 U.S.C. § 1104(a)(1)(B) (1994). The federal Employers' Liability Act (FELA) provides, "Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . ." 45 U.S.C. § 51 (1994).

directors and officers of federally chartered savings associations is § 1821(k). Nothing in § 1821(k), however, nor in any other part of FIRREA, authorizes federal courts to create liability rules for such directors and officers.

E. There Is No Basis For The Interstitial Use Of Federal Common Law In This Case

There are no interstices to be filled in any federal statute that would justify the creation of federal common law liability standards for directors and officers of federally chartered depository institutions. As indicated, the applicable statute, HOLA, simply does not address the issue of director or officer liability. Therefore, there are no details to be "fleshed out" in the statutory scheme that would justify the creation of federal common law on this basis. This stands in sharp contrast to other federal statutory schemes where Congress has addressed a particular issue and where the Court has approved judicial rulemaking to fill in interstitially the statutory pattern that Congress enacted. *See, e.g., Varity Corp. v. Howe*, 116 S. Ct. 1065, 1070 (1996) (courts may develop a federal common law of rights and obligations for employee benefit plans regulated under ERISA); *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2410 (1994) (adopting a "common-law zone of danger test as delimiting the proper scope of an employer's duty under FELA to avoid subjecting its employees to negligently inflicted emotional injury").

F. The Fact That City Federal Was Federally Chartered Does Not Give Rise To A "Significant Conflict Between Some Federal Policy Or Interest And The Use Of State Law"

The only significant remaining question is whether federal common law liability standards must be applied in lieu of state law standards simply by virtue of the fact that City Federal was federally chartered rather than state chartered. Some lower court decisions, particularly those rendered before *O'Melveny*, have held that because federally chartered savings associations are subject to comprehensive federal regulation " 'from [their] cradle to [their] corporate grave,' " *Fidelity Fed. Sav. & Loan*

Ass'n v. de la Cuesta, 458 U.S. 141, 145 (1982) (quoting *People v. Coast Fed. Sav. & Loan Ass'n*, 98 F. Supp. 311, 316 (S.D. Cal. 1951)), federal law alone governs their internal affairs, including the issue of director and officer liability. *See, e.g., RTC v. Hess*, 820 F. Supp. 1359, 1362 (D. Utah 1993) ("[F]ederal law exclusively governs the internal affairs of federal savings and loan associations . . . ."); *City Fed. Sav. & Loan Ass'n v. Crowley*, 393 F. Supp. 644, 655 (E.D. Wis. 1975) ("[A] state court adjudicating [the fiduciary duties of directors of a federal savings and loan] would have to apply federal common law rules rather than the laws of its own state."); *Rettig v. Arlington Heights Fed. Sav. & Loan Ass'n*, 405 F. Supp. 819, 826 (N.D. Ill. 1975) ("[O]nly federal law may be applied to questions involving [fiduciary duties of federal savings and loan directors].").

We respectfully suggest that these and similar cases have been wrongly decided. It is, of course, indisputable that federally chartered savings associations have been subject to extensive federal regulation both under the terms of HOLA and the regulations promulgated pursuant thereto by the FHLBB (prior to FIRREA) and the OTS (since FIRREA). Indeed, this Court has indicated that, while it was in existence, the FHLBB's authority to regulate federally chartered savings associations was virtually unlimited. *Fidelity Fed.*, 458 U.S. at 144. Accordingly, when HOLA or regulations promulgated thereunder by the FHLBB or OTS address a particular question pertaining to federally chartered savings associations, any conflicting state rule is perforce preempted.[22] Yet, despite the breadth of HOLA and the

[22] The preemption doctrine is rooted in the Supremacy Clause, U.S. Const. art. VI, cl. 2. If Congress intends, either explicitly or implicitly, to displace state law completely, the federal statute or regulation will supersede the state rule. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, *rev'd on other grounds sub nom., Rice v. Board of Trade*, 331 U.S. 247 (1947). Where Congress has not completely displaced state regulation in a particular area, federal law may still preempt state law where "compliance with both federal and state [law] is a physical impossibility," *Florida Lime & Avocado Growers, Inc., v. Paul*, 373 U.S. 132, 142-43 (1963), or where the

(footnote continues)

regulations thereunder governing federal savings associations, one will search them in vain for a single provision that addresses the standard of director or officer liability for breach of the duty of care. There can be no "significant conflict," *O'Melveny*, 114 S. Ct. at 2055, between the use of state law standards of liability for directors and officers of federally chartered institutions and any identifiable federal policy or interest respecting such standards because HOLA and the regulations thereunder simply do not address the issue.

Indeed, the fact that HOLA and the FHLBB and OTS regulations create a "comprehensive scheme" of federal regulation of federally chartered institutions itself precludes creation of supplementary federal common law causes of action or standards of liability respecting directors and officers of federally chartered savings associations in lieu of state law causes of action and standards of liability that would otherwise apply. This point was made decisively in *O'Melveny*. The Court acknowledged that if there is "an explicit federal statutory provision," then of course state law is displaced. *O'Melveny*, 114 S. Ct. at 2054. But state law does not have to give way to judge-made federal common law merely where, as here, the federal scheme is comprehensive: "Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; *matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law.*" *Id.* (emphasis added).

Indeed, the Court recognized in *O'Melveny* that FIRREA constitutes "comprehensive legislation." *Id.* at 2054. Accordingly, the Court ruled that this gives courts no authority to "supplement" FIRREA with common law exceptions to the statutory scheme. *Id*. In like manner, the fact that HOLA and the regulations promulgated by the FHLBB and OTS constitute a comprehensive federal regulatory scheme for federally chartered savings

(footnote continued)

state rule is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

associations precludes federal courts from "supplement[ing]" that scheme with federal common law rules respecting the liability of directors and officers of such associations for ordinary negligence. It is noteworthy that the Court has declined to authorize the creation of federal common law in other contexts where the federal regulatory scheme undeniably has been comprehensive. *See, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97-100 (1991) (refusing to adopt a federal common law rule of demand futility in an action founded on the Investment Company Act of 1940); *Burks v. Lasker*, 441 U.S. 471, 480-86 (1979) (refusing to adopt a federal common law rule respecting termination of derivative actions by directors under the Investment Company Act of 1940 and the Investment Advisers Act of 1940); *United States v. Kimbell Foods, Inc.*, 440 U.S 715, 718 (1979) (refusing to adopt a federal common law rule of lien priority for federal loan programs, holding that "a national rule is unnecessary to protect the federal interests underlying the loan programs").

The fact that Congress has clearly shown an interest in the regulation of federally chartered savings associations, as evidenced by the provisions of HOLA that govern the powers and operations of such associations, cannot be read as authorization for federal courts to apply federal common law in this area. The Court soundly rejected the FDIC's argument in *O'Melveny* "that FIRREA as a whole, by demonstrating the high federal interest in this area, confirms the courts' authority to promulgate [federal] common law." 114 S. Ct. at 2054. *See also Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988) (determination that "procurement of equipment by the United States is an area of uniquely federal interest does not . . . end the inquiry" into whether state law applies; "[d]isplacement [of state law and its replacement by federal common law rules] will occur only where, as we have variously described, a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' or the application of state law would 'frustrate specific objectives' of federal legislation" (quoting *Wallis*, 384 U.S. at 68, and *Kimbell Foods*, 440 U.S. at 728)).

It may be suggested that *O'Melveny* is inapposite because the Court there was asked to create a new federal common law rule of decision regarding imputation of knowledge whereas here the Court is merely being asked to permit the application of "well established" federal common law to claims against directors and officers of federally chartered institutions. *Cf. Motorcity of Jacksonville, Ltd. v. Southeast Bank N.A.*, 83 F.3d 1317 (11th Cir. 1996) (holding that *O'Melveny* did not apply to the "previously-established and longstanding federal common-law *D'Oench* doctrine").[23] *But cf. DiVall Insured Income Fund Ltd. Partnership v. Boatmen's First Nat'l Bank*, 69 F.3d 1398, 1402 (8th Cir. 1995) (relying on *O'Melveny* to hold that the *D'Oench* doctrine was preempted by FIRREA); *Murphy v. FDIC*, 61 F.3d 34, 38 (D.C. Cir. 1995) (same).[24] The plain fact is, however, that, despite the venerable age of *Briggs*, the federal common law respecting the liability standards for directors and officers of federally chartered depository institutions is anything but "well established." As noted above, it is at least arguable that *Briggs* and *Bowerman* both articulate a gross negligence standard of liability. *See supra* pp. 32-34. Cases since *Briggs* have reached no consensus on what the federal common law standard, if any, should be.[25] The FDIC is hardly in a position to deny this. It has candidly, and accurately, admitted that "[t]he content of the federal common law standard . . . is not clearly established." Br. for the Resp. in Opp. at 16-17. Indeed, so little "well established"

[23] The "federal common-law *D'Oench* doctrine" was announced by the Court in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). The doctrine "prevents plaintiffs from asserting as either a claim or defense against the FDIC oral agreements or 'arrangements.'" *Adams v. Zimmerman*, 73 F.3d 1164, 1168 (1st Cir. 1996) (quoting *Timberland Design, Inc. v. First Serv. Bank for Sav.*, 932 F.2d 46, 48-50 (1st Cir. 1991)).

[24] Other circuit courts have suggested, in dicta, that the federal common law *D'Oench* doctrine did not survive FIRREA and *O'Melveny*. *Dimuzio v. RTC*, 68 F.3d 777, 780 (3d Cir. 1995); *RTC v. Kennelly*, 57 F.3d 819, 822 n.3 (9th Cir. 1995).

[25] *See RTC v. Chapman*, 29 F.3d 1120, 1127 (7th Cir. 1994) (Posner, J., dissenting) ("[I]t is also unclear . . . just what the federal common law rule is. . . . [T]he cases are all over the lot.").

is the federal common law standard, even in 1996, that the court below found it necessary to remand the case to the district court to determine initially what standard of liability applies under federal common law. 57 F.3d at 1247 n.16, 1249, Pet. App. A32, A37.

For this same reason, it is implausible to argue that federal common law should be applied to the directors and officers of federally chartered institutions to assure that the liability standards for all such directors and officers will be uniform. The federal courts have had over a century since *Briggs* to develop a uniform common law standard and they have not done so yet. Unless this Court itself establishes a standard unequivocally, there is no reason to believe that federal common law standards will be any more uniform than state law standards. With thirteen federal circuit courts and hundreds of federal district courts, there can certainly be as much diversity at the federal court level as there is among the states.

Moreover, Congress and the regulators have given no indication that they regard achieving uniformity to be an important federal policy. HOLA has been in existence for more than 50 years and has been amended many times. Yet Congress has never seen fit to articulate a uniform standard of liability for directors and officers of federally chartered savings associations. The failure of Congress and the FHLBB or OTS to create any statutory provisions or rules respecting director or officer liability — in the face of the lack of any uniformity in federal court decisions and given innumerable opportunities to establish uniformity — strongly suggests that uniformity in the standards governing director or officer liability has not been considered to be a significant federal policy interest.

Indeed, in § 1821(k) itself Congress has provided that the term "gross negligence" shall be "defined and determined under applicable State law." That indicates that Congress had no aversion to the use of state law in resolving director and officer liability questions for federally chartered institutions and, indeed, had an obvious preference for the application of state

law to federal common law in this instance. After all, Congress could have set forth its own definition of "gross negligence" or could have specified that the federal courts shall define the term. Of course, by specifying that state law should be consulted for the definition of gross negligence for § 1821(k) purposes, Congress necessarily recognized that there may be a lack of uniformity in definitions. That obviously not only did not bother Congress; it is the result that Congress consciously chose. *See Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, 209 (1946) (where part of regulatory scheme relies on state law, "assumption" that uniformity is necessary cannot be made).[26]

In the past few years, several courts have ruled that state law is inapplicable to the directors and officers of federally chartered institutions by virtue of the so-called "internal affairs" doctrine. *See, e.g., RTC v. Chapman*, 29 F.3d 1120, 1122-24 (7th Cir. 1994); *RTC v. Gladstone*, 895 F. Supp. 356, 363 (D. Mass. 1995); *RTC v. Camhi*, 861 F. Supp. 1121, 1126 (D. Conn. 1994). That doctrine holds that "the law of the state of incorporation normally determines issues relating to the internal affairs of a corporation." *First Nat'l City Bank v. Banco Para el Comercio Exterior*, 462 U.S. 611, 621 (1983). Courts that rely on the doctrine to deny the applicability of state law to director or officer liability contend that, just as the law of the state of incorporation

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[26] It is noteworthy in this respect that this Court has refused to fashion a federal rule of decision regarding an issue that falls within an area traditionally governed by state law. *See United States v. Yazell*, 382 U.S. 341, 352 (1966) ("Both theory and the precedents of this Court teach us solicitude for state interests . . . ."); *United States v. Brosnan*, 363 U.S. 237, 242 (1960); *Beaver County*, 328 U.S. at 210 (courts should apply state law to issues that are "deeply rooted in state traditions, customs, habits, and laws").

The standard of director and officer liability at issue in this case falls squarely within two traditional areas of state law: tort law and corporation law. Tort law is among the most fundamental areas of state law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Similarly, issues of corporate law are traditionally a matter of state law. *See Business Roundtable v. SEC*, 905 F.2d 406, 412 (D.C. Cir. 1990) (vacating an SEC rule that would "overturn or at least impinge severely on the tradition of state regulation of corporate law").

resolves issues relating to the internal affairs of a state chartered corporation, so federal law should control the internal affairs of a federally chartered depository institution. *Chapman* is the leading case espousing application of the internal affairs doctrine to federally chartered savings associations. 29 F.3d 1120. The Seventh Circuit there held that the RTC had no assertable state law claim against the directors and officers of a federally chartered savings association because, while "there is no federal corporate code," the "[f]ederal courts have no less authority to shape a common law for federal corporations than state courts have had to devise a common law for firms incorporated in their jurisdictions." *Id.* at 1123.

We submit that application of the internal affairs doctrine in the present context is inappropriate. The doctrine is a conflict of laws principle that properly applies where a choice must be made between the laws of two or more states. *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982). The doctrine has no application here, where the "choice" is between the application of state law or federal common law rules of decision. *O'Melveny* provides the guidelines for determining how that choice is to be made. Remarkably, even though *Chapman* was decided shortly after *O'Melveny*, the Seventh Circuit never mentions *O'Melveny* in its opinion. A number of recent cases have recognized, however, that application of the internal affairs doctrine to the liability of directors and officers of federally chartered associations is inconsistent with *O'Melveny*. Accordingly, they have ruled that state law, not federal common law, governs such liability. *See, e.g.*, *FDIC v. Cohen*, 95 Civ. 683 (LLS), 1996 U.S. Dist. LEXIS 2247, at *27 (S.D.N.Y. Feb. 28, 1996) (federal law does not govern the liability of the directors of a federally chartered bank "because the creation of a federal common law is disfavored"); *FDIC v. Abel*, 92 Civ. 9175 (JFK), 1995 U.S. Dist. LEXIS 18159, at *15 (S.D.N.Y. Dec. 5, 1995) ("[S]tate law claims may be brought against directors and officers of federally-chartered banks . . . ."); *FDIC v. Raffa*, 882 F. Supp. 1236, 1244 (D. Conn. 1995) ("[T]he mere fact that a financial institution is federally chartered does not immunize that institution from state law."); *RTC v. Gregor*, 872 F. Supp. 1140, 1146 (E.D. N.Y. 1994) (in light of *O'Melveny*, pre-FIRREA state law provides the applicable standard of care for directors and officers of federally chartered institutions); *RTC v. Fiala*, 870 F. Supp. 962, 969 (E.D. Mo. 1994) ("The Court finds the state/federal distinction . . . nonsensical."). *See also RTC v. Gibson*, 829 F. Supp. 1103, 1109 n.2 (W.D. Mo. 1993) ("There is nothing to suggest that officers and directors of federally chartered institutions are only subject to federal causes of action.").

Indeed, the Court has already made clear that state law can apply to the internal affairs of a federally chartered savings association. In *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), the Court affirmed the application of a state employment discrimination law to a federally chartered savings association that had failed to reinstate an employee returning from pregnancy disability leave to the job she had previously held. *Cf. Wichita Royalty Co. v. City Nat'l Bank*, 306 U.S. 103 (1939) (applying state law to tort claim by depositor against directors of national bank). Other courts have reached similar results. *See, e.g., Goldman v. First Nat'l Bank*, 985 F.2d 1113, 1121 (1st Cir. 1993) (state law claim by former employee of national bank for breach of employment contract); *Austin v. Altman*, 332 F.2d 273, 276 (2nd Cir. 1964) (in action by shareholders of national bank against bank directors for various alleged improprieties in connection with the organization of the bank, the court held the case was not "a federal matter merely because the bank is chartered under federal law").[27]

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[27] Other courts have applied state laws to employment disputes and other internal affairs of other federally chartered entities such as Amtrak and the American Red Cross. *See, e.g., Hirras v. National R.R. Passenger Corp.*, 44 F.3d 278 (5th Cir. 1995) (holding that an Amtrak employee may proceed with state law negligent infliction of emotional distress claim against Amtrak where the elements of the claim are factual questions that pertain to the conduct of the employee and the employer); *Cummings v. National R.R. Passenger Corp.*, 514 Pa. 230, 523 A.2d 338 (state law breach of employment contract claim by an Amtrak employee against Amtrak),

(footnote continues)

In accordance with the authorities discussed above, we submit that state law claims for negligence apply to the directors and officers of federally chartered savings associations of their own force. But, even if it were the case that federal law governs the issue of the standard of liability of directors and officers of federally chartered institutions in the first instance, that "does not much advance the ball." *O'Melveny*, 114 S. Ct. at 2053. As the Court in *O'Melveny* noted, application of federal law "includes federal adoption of state-law rules." *Id. See also Boyle*, 487 U.S. at 508 n.3; *Kimbell Foods*, 440 U.S. at 726; *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 594 (1973). It is only when a "significant conflict" exists between the application of such state law rules of decision and an identifiable federal policy that any basis exists for the creation of a uniform federal common law rule of decision. *O'Melveny*, 114 S. Ct. at 2055; *Boyle*, 487 U.S. at 508; *Wallis*, 384 U.S. at 68. As demonstrated above, no such "significant conflict" exists in this case.

Accordingly, there never was before the enactment of § 1821(k), and there is not now, any justification for the creation or application of a uniform federal common law rule of decision regarding the standard of liability for directors and officers of federally chartered savings associations. Any claims that the RTC or FDIC may have against the directors and officers of federally chartered savings associations are assertable only under § 1821(k) for gross negligence or under state law for simple negligence in the applicable states recognizing a simple negligence standard of liability.

(footnote continued)

cert. denied, 484 U.S. 852 (1987); *American Nat'l Red Cross v. Labor Relations Comm'n*, 363 Mass. 525, 296 N.E.2d 214 (1973) (applying Massachusetts law to regulate the labor practices of the local Red Cross chapter).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHN W. ATHERTON, JR., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR CITY SAVINGS, F.S.B.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION

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QUESTION PRESENTED

Whether Section 212(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. 1821(k), eliminated the right of the Federal Deposit Insurance Corporation, as receiver, to assert a federal savings association's federal common-law claims against a former officer and director of the association.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A50) is reported at 57 F.3d 1231. The opinion of the district court (Pet. App. A65-A67) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A51-A53) was entered on June 23, 1995. A petition for rehearing was denied on September 14, 1995. Pet. App. A54-A56. The petition for a writ of certiorari was filed on December 12, 1995, and granted on April 15, 1996 (116 S. Ct. 1415). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 212(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. 1821(k), provides in relevant part as follows:

> A director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by * * * the [Federal Deposit Insurance] Corporation * * * for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the [Federal Deposit Insurance] Corporation under other applicable law.

Section 212(a) of FIRREA, 12 U.S.C. 1821(d)(2)(a), provides in relevant part as follows:

> The [Federal Deposit Insurance] Corporation shall, as conservator or receiver, and by operation of law, succeed to * * * all rights, titles, powers, and privileges of the insured depository institution * * *.

STATEMENT

1. City Federal Savings Bank (City Federal) was a federally chartered, federally insured savings bank located in Bedminster, New Jersey. On December 7, 1989, the Director of the Office of Thrift Supervision (OTS) declared City Federal insolvent and appointed the Resolution Trust Corporation (RTC) as its receiver. Under 12 U.S.C. 1821(d)(2)(A), the RTC succeeded to all of City Federal's rights, titles, powers, and privileges.[1]

[1] The RTC was vested with "the same powers and rights to carry out its duties with respect to institutions" for which it was appointed as conservator or receiver as the Federal Deposit Insurance Corporation (FDIC) has under Sections 1821, 1822, and 1823 of Title 12. 12 U.S.C. 1441a(b)(4).

Through a series of transactions, City Federal's assets (including any civil claims for monetary damages that City Federal may have had against any of its former officers or directors) were transferred to a newly chartered federal savings bank, City Savings, F.S.B., which, on January 11, 1991, was itself subject to an RTC receivership.

In its capacity as receiver for City Federal and its successors in receivership and conservatorship, the RTC filed suit against several of City Federal's former directors and officers, including petitioner (who was throughout the relevant period a director and, at various times, chief operating officer, chairman, president, and chief executive officer of City Federal). See generally C.A. J.A. A12-A55 (First Amended Complaint). The complaint, based on federal common law and state statutory and common law, alleged breach of fiduciary duty, negligence and gross negligence. *Id.* at A54; Pet. App. A11. The RTC asserted that the defendants had failed to exercise appropriate care in their consideration, approval, and oversight of several large acquisition, development, and construction loans that ultimately defaulted, resulting in losses to City Federal of more than $100 million. Pet. App. A11.

The district court granted petitioner's motion to dismiss. Pet. App. A57-A64. The court accepted petitioner's view—in which the RTC concurred—that, because City Federal was a federally chartered institution, federal law must govern its internal affairs, including the standard of care that determined its officers' and directors' liability. *Id.* at A61. The court then held that Section 212(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. 1821(k), which authorizes suit by the federal receiver for gross negligence, provides the exclusive federal-law standard of liability, supplanting the RTC's right to proceed under the federal common-law standard that would

have applied in a suit brought by City Federal on its own behalf prior to the receivership. Pet. App. A61-A64.

Upon the RTC's request, the district court certified for interlocutory appeal its order dismissing the RTC's complaint. Pet. App. A66.[2] The court of appeals granted the RTC's petition for interlocutory review, *id.* at A68, and consolidated the appeal with an interlocutory appeal that had been filed by other defendants in an unrelated suit brought by the RTC as receiver for United Savings and Loan of Trenton, New Jersey (United Savings). Because United Savings was a state-chartered institution, the negligence and breach of fiduciary duty claims that the RTC asserted against the officers and directors in that case were based on New Jersey law. *Id.* at A9-A10. The district court in the *United Savings* case had rejected the defendants' argument that Section 1821(k) preempted the RTC's ability to assert state-law claims that United Savings could itself have asserted before going into receivership. *Id.* at A10.

2. The court of appeals reversed the district court's order dismissing the RTC's federal common-law claims against petitioner and the other City Federal defendants, and affirmed the district court's refusal to dismiss the RTC's state-law claims against the United Savings defendants. Pet. App. A1-A37. It rejected the conclusion that Congress intended Section 1821(k) to be the exclusive civil remedy in suits by the RTC, as receiver, against officers and directors of federally insured depository institutions. The court interpreted Section 1821(k) as establishing a minimum standard of liability for suits by the federal receiver that ensures its ability, irrespective of any limitations in the law of the chartering authority, to recover for damages caused by the gross negligence (or even more culpable conduct) of officers or directors of federally insured institutions.

[2] At the same time, the court permitted the RTC to file an amended complaint adding statutory claims for gross negligence under Section 1821(k).

The court of appeals began with the observation that the RTC, as receiver, was entitled to succeed to all of the rights that City Federal had itself possessed, including the right to assert claims sounding in federal common law against City Federal's officers and directors. Pet. App. A28.[3] In the court's view, Section 1821(k) did not disturb that right. Looking to the text of the statute, the court read the last sentence of Section 1821(k) (the savings clause) to preserve the federal receiver's ability to seek recovery under "*all* 'other applicable law,' including the less forgiving negligence and fiduciary duty standards of care under state law and federal common law." *Id.* at A13. It rejected petitioner's suggestion that, insofar as federal law is concerned, "other applicable law" refers only to the administrative remedies available to regulators under FIRREA. *Id.* at A14.

The court's interpretation of Section 1821(k) as establishing a minimum standard for officer and director liability to the federal receiver was, in its view, consistent with Congress's modest goal (as revealed by the legislative history of Section 1821(k)) "to ensure that directors and officers of state-chartered institutions * * * not escape liability to the RTC under the shield of certain state laws that had effectively insulated them even from claims based on their grossly negligent or reckless conduct." *Id.* at A23; see also *id.* at A30 (Congress intended to "address the question of what standard should apply in cases where the RTC was confronted with an applicable state insulating statute, * * * *not* * * * to define the standard of care applicable to federally chartered institutions governed by federal common law.").

The court of appeals reserved judgment as to the content of the federal common-law standard (*i.e.*, whether it is one of ordinary or gross negligence). Pet. App. A32

[3] The court stated its understanding that "federal law exclusively governs [cases involving the liability of directors and officers] when the institution is federally chartered, like City Federal." Pet. App. A10 n.5.

n.16, and directed the district court on remand "to permit the RTC to pursue any claims for negligence or breach of fiduciary duty available as a matter of federal common law," *id.* at A37.[4]

Judge Mansmann concurred in part and dissented in part. Pet. App. A38-A50. She agreed with the majority that the power accorded the federal receiver in Section 1821(k) to pursue claims for gross negligence does not bar the federal receiver from asserting a state-chartered institution's own state-law claims sounding in ordinary negligence or breach of fiduciary duty against its former officers and directors, *id.* at A38, but she concluded that Section 1821(k) does establish an exclusive gross-negligence standard for suits by the federal receiver against officers and directors of federally chartered institutions, *id.* at A50.

On December 31, 1995, the RTC terminated, in accordance with the provisions of the Resolution Trust Corporation Completion Act, 12 U.S.C. 1441a(m)(1). The RTC was succeeded in its capacity as receiver by the Federal Deposit Insurance Corporation (FDIC). 12 U.S.C. 1441a(b)(4)(A).[5]

[4] In light of the court's conclusion that Congress had no intention of altering the rights of the federal receiver *vis a vis* officers and directors of federally chartered depository institutions, it held that Section 1821(k) does not apply at all to suits by the federal receiver against such officers or directors. In the court's view, the RTC therefore could not assert gross-negligence claims under Section 1821(k) against petitioner or the other City Federal defendants. Pet. App. A37 n.17. Congress does appear to have been motivated by, and to have focussed exclusively on, problems peculiar to suits by the federal receiver against officers and directors of state-chartered, federally insured depository institutions. See generally pp. 36-41, *infra*. We nevertheless agree with petitioner (Pet. Br. 22-24) that the language of Section 1821(k) encompasses suits by the federal receiver against officers and directors of both federally and state-chartered institutions. ("Insured depository institution" means "any bank or savings association the deposits of which are insured by the [FDIC]," 12 U.S.C. 1813(c)(2); "bank" includes both state banks and national banks, 12 U.S.C. 1813(a)(1)(A); and "savings association" includes both federal savings associations and state savings associations, 12 U.S.C. 1813(b)(1).) We believe, accordingly, that the FDIC may bring a suit under Section 1821(k)'s gross-negligence standard against the officers or directors of a federally chartered institution such as City Federal.

SUMMARY OF ARGUMENT

I. Petitioner maintained in district court that, because City Federal operated under a federal charter, the standard of liability applicable to its officers and directors was necessarily a matter of federal, not state, law. In his petition for certiorari, he asked this Court to consider whether 12 U.S.C. 1821(k), which authorizes the FDIC to sue for gross-negligence, supplants the FDIC's right, as receiver, to assert against him any federal common-law claims for ordinary negligence that City Federal might have been able to pursue against him on its own behalf. In his merits brief, however, petitioner argues that City Federal could not itself have sued him for ordinary negligence under federal common law, because (he now contends) the standard of liability for officers and directors of federally chartered depository institutions is governed by state, not federal, law. Because the petition for certiorari did not question the decision below that federal common law governs the liability of officers and directors of federal depositories to their own institutions, this Court may not wish to address that issue. If the Court does address the issue, it should reject petitioner's new-found argument that state law governs the internal affairs of federally chartered institutions.

A corporation is a creature of the law under which it is chartered. Matters pertaining to the internal affairs of a state-chartered corporation—those matters affecting the relationships among or between its directors, officers and shareholders—are therefore governed by the law of the State of incorporation. Federal savings associations and national banks, however, are entirely creatures of federal

[5] For simplicity's sake, we refer to the federal receiver uniformly hereafter as the FDIC.

law; they are federally chartered, federally organized, and federally regulated. For that reason, it is the law of the United States, not the law of any particular State, that governs their internal affairs.

Federal common law will, in some circumstances, incorporate state law as the applicable rule of decision. Here, however, federal law itself provides the appropriate substantive standards. The chartering authority for federal savings associations, the OTS, is authorized, after notice and a hearing, to assess civil monetary penalties against and/or remove from office directors and officers of federal savings associations for, *inter alia*, breach of fiduciary duties. In the course of agency adjudications, the OTS has authoritatively spoken to the fiduciary duties owed by officers and directors to federal thrifts, and has concluded that that duty is one of ordinary care. The courts should look to the degree of care demanded by the OTS, and to the OTS's specification of the functional responsibilities of officers and directors, in civil actions against officers or directors brought by or on behalf of federal thrifts. The alternative—application of various state-law formulations—would subject officers and directors to multiple and possibly conflicting standards of conduct and thereby undermine the OTS's ability to implement a coherent and uniform regulatory policy.

II. By virtue of 12 U.S.C. 1821(d)(2)(A)(i), the FDIC as receiver steps into the shoes of a failed federally insured depository institution and succeeds as a matter of law to all of that institution's rights, titles, powers and privileges, including any civil claims that it might possess against its former officers and directors. Section 1821(k) of Title 12 authorizes the FDIC to pursue claims against former officers and directors of failed federally insured depository institutions "for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence)." Its savings clause provides that that authorization shall not "impair or affect any right of the [FDIC] under other

applicable law." *Ibid.* In our view, Section 1821(k) means precisely what it says: The FDIC has the right to sue for gross negligence (or more culpable conduct), irrespective of whether the failed institution itself had that right under applicable law; the FDIC also has the right to pursue whatever claims the failed institution could itself have pursued under other applicable law (including federal common law).

The legislative history of Section 1821(k) confirms this interpretation of the text. That history demonstrates that Congress intended through Section 1821(k) to expand, not limit, the FDIC's rights. Congress authorized the FDIC to sue for gross negligence in order to preempt state statutes that would otherwise limit the FDIC, in its capacity as receiver for state-chartered institutions, to suits for reckless or intentional misconduct. There is no indication in the legislative history of any congressional intention to create an exclusive gross-negligence standard of liability for officers and directors of federally chartered depository institutions or (more generally) to eliminate the FDIC's established right to pursue any claims to which it might succeed as receiver.

ARGUMENT

I. THE STANDARD OF LIABILITY APPLICABLE IN A SUIT AGAINST AN OFFICER OR DIRECTOR OF A FEDERALLY CHARTERED SAVINGS ASSOCIATION FOR BREACH OF DUTY TO THE ASSOCIATION IS GOVERNED BY FEDERAL LAW

Petitioner conceded—indeed affirmatively maintained—in the district court that the standard of liability in a suit brought by City Federal against its directors and officers would have been determined exclusively by federal law. Brief of Defendants John W. Atherton, Jr., et al., in Support of Their Motion To Dismiss the Amended Complaint of Plaintiff Resolution Trust Corporation at 11-17; see *id.* at 16-17 ("[B]ecause City Federal was a federally

chartered savings institution subject to plenary federal regulation, the liability of the Directors, if any, to the [FDIC] as receiver for City Federal must be determined solely in accordance with applicable federal law."); see also Brief of Defendants John W. Atherton, Jr., et al., in Reply to the RTC's Opposition to Motion to Dismiss at 1-2 ("[S]tate law is inapplicable to the internal affairs of a federally chartered thrift, like City Federal, including the issue of the scope of a director's liability to such institution."). The FDIC concurred in that view. C.A. J.A. A67-A68. Petitioner and the FDIC disagreed in the district court only with regard to petitioner's assertion that, as to suits by the federal receiver, 12 U.S.C. 1821(k) created an exclusive gross-negligence standard of liability that supplanted the FDIC's right to rely on the standard of liability applicable under federal common law. Pet. App. A63-A64.

The court of appeals also understood petitioner to concede "that before receivership City Federal * * * had a right to bring an action against [him] under federal common law." Pet. App. A28. The questions that petitioner presented to this Court in his petition for certiorari addressed only whether Section 1821(k) supplanted any applicable federal common-law standard of liability in suits by the FDIC as receiver against officers and directors of federally chartered depository institutions.[6]

[6] Although petitioner voiced doubt in a footnote as to whether there was a federal common law of officer and director liability prior to the enactment of FIRREA (Pet. 19 n.6), he presented only the following questions for review:

> 1. Whether Section 1821(k) supplants "federal common law" and constitutes the exclusive standard of liability in a civil damage action brought by the Resolution Trust Corporation (the "RTC") against the former officers and directors of a failed federally chartered FDIC insured savings bank.
>
> and
>
> 2. Whether the court of appeals erred in concluding that Section 1821(k)—a *federal* statute expressly made applicable to actions against officers or directors of "*any*" FDIC insured bank or savings association, without regard to where it is chartered—has *no* application whatsoever to RTC actions against officers and directors of failed *federally* chartered FDIC insured institutions, and that the liability of officers and directors of such institutions is instead governed exclusively by "federal common law."

See Pet. i-ii.

In his brief on the merits, however, petitioner presents a new question: "Whether, even if § 1821(k) does not supplant federal common law, federal courts are nevertheless precluded from applying any federal common law standard of liability to the conduct of directors and officers of federally chartered depository institutions in light of *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994)." See Pet. Br. i. Petitioner now argues (*id.* at 32-48)—in diametric opposition to his position in the district court—that it is state law that governs the liability of officers and directors to federally chartered depository institutions.[7]

This Court ordinarily will consider "[o]nly the questions set forth in the petition, or fairly included therein." *Caspari* v. *Bohlen*, 114 S. Ct. 948, 952 (1994) (quoting Sup. Ct. R. 14.1(a)); *General Talking Pictures Corp.* v. *Western Elec. Co.*, 304 U.S. 175, 179 (1938). The Court will consider an issue first raised in a merits brief "only in the most exceptional cases." *Izumi Seimitsu*

[7] This Court's intervening decision in *O'Melveny* does not justify petitioner's change in position. In that case, the Court rejected the FDIC's argument that its interest as insurer of deposits justified the creation of a new federal common-law rule in a state-law action brought by the FDIC as receiver of a state-chartered thrift. Petitioner's argument in the district court regarding the exclusive applicability of federal-law standards of liability in suits by the federal receiver against officers and directors of federally chartered institutions had nothing to do with the FDIC or its interests as insurer. Rather, petitioner argued that federal, not state, law governs the internal affairs of institutions that operate under a federal charter.

Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*, 114 S. Ct. 425, 427 (1993) (per curiam).

This is not such an exceptional case. So long as this Court accepts, or assumes for purposes of this case, that federal law governs the internal affairs of a federally chartered depository institution (including the standard of liability that applies in a suit by the institution against its own officers and directors)—an almost tautological proposition that petitioner himself advanced before the district court—the Court may reach and decide the questions presented in the petition. For these purposes, the Court need not consider (nor make any assumptions respecting) the source or content of the federal common-law standard, an issue that the court of appeals directed the district court to consider on remand. See Pet. App. A37. If the Court reaches that issue, however, we think it clear that, in a civil suit by a federally chartered depository institution against its officers and directors, the standard of liability is appropriately drawn from the fiduciary standards applied by the federal chartering authority, rather than from state corporation law.

A. The Duties Owed By Officers And Directors To Federally Chartered Depository Institutions Are A Matter Of Federal Law

This Court recognized more than one hundred years ago that, in addition to the specific statutory obligations set forth in the National Bank Act, officers and directors of national banks owe their institutions fiduciary duties of loyalty and care derived from and enforceable under common law. See *Briggs* v. *Spaulding*, 141 U.S. 132, 146-147 (1891); see also *Yates* v. *Jones Nat'l Bank*, 206 U.S. 158, 178 (1907) ("[T]he statute does not relieve the directors from the common law duty to be honest and diligent."); *Bowerman* v. *Hamner*, 250 U.S. 504, 510-511 (1919) ("While the statute furnishes the exclusive rule for determining whether its provisions have been violated or not, this does not prevent the application of

the common-law rule for measuring violations of common law duties."). The Court further explained that, under the common law, "directors must exercise ordinary care and prudence in the administration of the affairs of a bank." *Briggs*, 141 U.S. at 165, *i.e.*, that degree of care "which ordinarily prudent and diligent men would exercise under similar circumstances," *id.* at 152.[8] The Court did not attempt to define with "precision the degree of care and prudence which [such] directors must exercise in the performance of their duties," observing, rather, that "each case has to be determined in view of all the circumstances." *Id.* at 147, 152. The ordinary-care formulation articulated by this Court in *Briggs* is still regarded as the "classic statement of the standard of care for bank directors." 3A James Solheim & Kenneth Elkins, *Fletcher Cyclopedia of the Law of Private Corporations* § 1042.10, at 76 (1994) (*Fletcher Cyc. Corp.*); *id.* § 1084, at 147.

Briggs was decided before *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938). It involved the application of "general" common law. Because the standard of care owed a bank by its directors and officers was derived from common-law principles of universal application, *Briggs*, 141 U.S. at 146; *id.* at 147-152 (relying upon established federal, state, and English common-law authority), the drafters of the National Bank Act in 1864 would have felt no need expressly to define it in the statute. At that time, it would have been assumed that officers' and directors' fiduciary duties to national banks arose as a matter of law from Congress's creation of national banks in corporate form.

Although this Court in *Erie* subsequently repudiated the existence of "general" federal common law, *Erie* (a diversity case) had neither the "purpose [n]or effect [of]

[8] Accord *Bowerman*, 250 U.S. at 512 ("It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers.") (quoting *Martin* v. *Webb*, 110 U.S. 7, 15 (1884)).

broadening state power over matters essentially of federal character." *United States* v. *Standard Oil Co.*, 332 U.S. 301, 307 (1947). The vast majority of courts that have considered the matter since *Erie* have recognized the essentially federal character of the rules governing the internal affairs of federally chartered depository institutions, and have concluded therefrom that the standard of care applicable in civil actions against officers and directors of federally chartered depository institutions is a matter of federal law.[9]

[9] See Ronald W. Stevens & Bruce H. Neilson, *The Standard of Care for Directors and Officers of Federally Chartered Depository Institutions: It's Gross Negligence Regardless of Whether § 1821(k) Preempts Federal Common Law*, 13 Ann. Rev. Banking L. 169, 173-174 (1994) (footnotes omitted) ("Before the adoption of FIRREA, a consensus existed among the federal courts that because federally chartered savings and loan associations were subject to comprehensive federal regulation 'from [their] corporate cradle to [their] corporate grave,' federal law alone governed their internal affairs, including the issue of officers' and directors' liability. Federal courts have affirmed that position since Congress adopted FIRREA."); *id.* at 174 nn.19-20 (citing *RTC* v. *Farmer*, 823 F. Supp. 302, 306 (E.D. Pa. 1993); *RTC* v. *Hess*, 820 F. Supp. 1359, 1363, 1367-1370 (D. Utah 1993); *RTC* v. *Gallagher*, 800 F. Supp. 595, 602 (N.D. Ill. 1992), aff'd, 10 F.3d 416 (7th Cir. 1993); *FSLIC* v. *Olano*, Civ. A. No. 86-472, 1989 WL 54226, at *1 (E.D. La. May 17, 1989); *Mortensen* v. *First Fed. Sav. & Loan Ass'n*, 79 F.R.D. 603, 612 (D.N.J. 1978); *Rettig* v. *Arlington Heights Fed. Sav. & Loan Ass'n*, 405 F. Supp. 819, 826 (N.D. Ill. 1975); *City Fed. Sav. & Loan Ass'n* v. *Crowley*, 393 F. Supp. 644, 655 (E.D. Wis. 1975); *Meyers* v. *Beverly Hills Fed. Sav. & Loan Ass'n*, 499 F.2d 1145 (9th Cir. 1974)); see also, *e.g.*, *RTC* v. *Chapman*, 29 F.3d 1120, 1122-1124 (7th Cir. 1994); *RTC* v. *Gladstone*, 895 F. Supp. 356, 363 (D. Mass. 1995); *RTC* v. *Camhi*, 861 F. Supp. 1121, 1126-1127 (D. Conn. 1994); *FDIC* v. *Bates*, 838 F. Supp. 1216, 1218 (N.D. Ohio 1993), rev'd in part and remanded, 42 F.3d 369 (6th Cir. 1994); *RTC* v. *Gibson*, 829 F. Supp. 1110, 1120 (W.D. Mo. 1993); *RTC* v. *Cooper*, No. 3:92-3368-17 (D.S.C. 1993); *FSLIC* v. *Kidwell*, 716 F. Supp. 1315, 1317 (N.D. Cal. 1989), vacated in part on other grounds, 937 F.2d 612 (9th Cir. 1991) (Table). As petitioner notes, a small number of courts have applied state law in these circumstances. See Pet. Br. 46-47; see also p. 35 n.31, *infra*.

1. It "is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares." *CTS Corp.* v. *Dynamics Corp.*, 481 U.S. 69, 91 (1987). Indeed, "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate [its] domestic corporations." *Id.* at 89. Thus, as a general rule, a corporation's internal affairs—those "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders"—are governed by the law of the State of incorporation. *Edgar* v. *MITE Corp.*, 457 U.S. 624, 645 (1982) (citing Restatement (Second) of Conflict of Laws § 302 (1971)).

In the choice-of-law context, one function of the internal-affairs doctrine is to ensure uniformity in the rules applicable to each corporation; "otherwise a corporation could be faced with conflicting demands." *MITE Corp.*, 457 U.S. at 645; see also Restatement (Second) of Conflict of Laws, *supra*, § 302, cmt. e ("Uniform treatment of directors, officers and shareholders is an important objective which can only be obtained by having [their] rights and liabilities * * * governed by a single law.").

The internal-affairs doctrine is also based on more fundamental concepts of sovereignty. "Being the mere creature of law, [a corporation] possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819). A State's regulation of the corporate governance of domestic corporations is, therefore, "regulation of entities whose very existence and attributes are a product of [that State's] law." *CTS Corp.*, 481 U.S. at 89; *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949) ("[T]he corporate entity * * * [is] a wholly artificial creation whose internal relations between management and stockholders are dependent upon [the incorporating] state['s]

law."). It follows that "the first place one must look to determine the powers of corporate directors is in the relevant State's corporation law," which is "the font of corporate directors' powers." *Burks* v. *Lasker*, 441 U.S. 471, 478 (1979). And it similarly follows that, because a suit brought by or on behalf of a state-chartered corporation against its officers or directors directly implicates the "allocation of governing powers within the corporation," *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 101 (1991), the rules governing such actions are ones in which "the legislature of [that] state has wide [regulatory] powers," *Cohen*, 337 U.S. at 549.[10]

Federal savings associations, however, are wholly creatures of federal law. Under the Home Owners' Loan Act of 1933 (HOLA), ch. 64, 48 Stat. 128, 12 U.S.C. 1461 *et seq.*, Congress delegated to the Federal Home Loan Bank Board (FHLBB), now the OTS,[11] "broad authority to establish and regulate 'a uniform system' " of savings associations, "and to 'establish them with the force of the

[10] For that reason, in derivative suits brought on behalf of state-chartered corporations alleging violations of federal securities statutes, this Court has incorporated into the federal law the internal-affairs principles of the law of the chartering State. See, *e.g.*, *Kamen* v. *Kemper Fin. Servs., Inc., supra*; *Burks* v. *Lasker, supra*; cf. *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 478-479 (1977) (Rule 10b-5, 17 C.F.R. 240.10b-5, does not apply in circumstances where its application would create a "federal fiduciary principle" regulating "transactions which constitute no more than internal corporate mismanagement"). The Court has demonstrated similar respect for the States' authority to govern the internal affairs of state-chartered corporations in cases raising constitutional or statutory preemption challenges. See, *e.g.*, *CTS Corp.* v. *Dynamics Corp., supra* (state law regulating tender offers not preempted by Williams Act and not violative of Commerce Clause); *Cort* v. *Ash*, 422 U.S. 66 (1975) (no implied cause of action under federal election law, in part because recognition of implied cause of action would federalize duties of corporate directors); *Cohen* v. *Beneficial Indus. Loan Corp., supra* (rejecting constitutional challenge to state law requiring shareholders to post security for derivative suit).

[11] With the enactment of FIRREA, the OTS succeeded to the authority and responsibilities of the FHLBB. 12 U.S.C. 1462a.

government behind them, with a national charter." *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 166 (1982). The OTS is charged with providing for the "organization, incorporation, examination, operation, and regulation" of federal savings associations, "giving primary consideration [to] the best practices of thrift institutions in the United States." 12 U.S.C. 1464. Pursuant to that mandate, the FHLBB and the OTS have "regulat[ed] comprehensively the operations of these associations," *de la Cuesta*, 458 U.S. at 166-167, "governing 'the powers and operations of every Federal savings and loan association from its cradle to its corporate grave,' " *id.* at 145. See 12 C.F.R. Pt. 541.[12]

National banks also operate under a federal charter. Their formation, corporate organization, and powers are provided for under Chapter 2 of the National Bank Act. 12 U.S.C. 21-43. They have long been considered "instrumentalities of the Federal government created for a public purpose, and as such necessarily subject to the paramount authority of the United States," *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896); accord *Franklin Nat'l Bank* v. *New York*, 347 U.S. 373, 375 (1954); *Easton* v. *Iowa*, 188 U.S. 220, 230 (1903); *Farmers' & Mechanics' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 33-34 (1875). The National Bank Act directly controls certain aspects of national banks' corporate governance (*e.g.*, 12 U.S.C. 61 (shareholder voting), 71 and 72 (directors' qualifications), and 74 (vacancies)), and, pursuant to his authority under 12 U.S.C. 93a, the Comptroller of the Currency has promulgated detailed regulations governing their corporate practices, see 12 C.F.R. 7.2000-7.2024.[13] The States have the power to regulate

[12] OTS regulations comprehensively govern the incorporation and organization of federal savings associations, providing charter and bylaw forms that may be modified only with the consent of the OTS. See 12 C.F.R. Pts. 543, 544, 552.

[13] As to certain matters, the Comptroller has chosen to incorporate state law to fill regulatory gaps, authorizing national banks,

national banks "only with the consent, express or implied, of Congress," *Farmers' & Mechanics' Nat'l Bank*, 91 U.S. at 34-35,[14] and, while national banks are (by implied consent) ordinarily subject to the operation of general state laws in their dealings and contracts with third parties, *McClellan* v. *Chipman*, 164 U.S. 347, 356 (1896), this Court has never suggested that state law controls matters relating to their internal corporate governance.[15]

Just as the internal affairs of a state-chartered corporation are governed by the law of the chartering State, so federal law governs the internal affairs of federally chartered institutions.[16] See, *e.g.*, *RTC* v. *Chapman*, 29 F.3d

"[t]o the extent not inconsistent with applicable Federal banking statutes or regulations, or bank safety and soundness, * * * to follow the corporate governance procedures of the law of the state in which the main office of the bank is located, the law of the state in which the holding company of the bank is incorporated, the Delaware General Corporation Law, * * * or the Model Business Corporation Act." 12 C.F.R. 7.2000(b).

[14] Congress has, in certain instances, expressly subjected national banks to restrictions that apply to state-chartered banks under state law. See, *e.g.*, 12 U.S.C. 36(c) (establishment of branch banks); 12 U.S.C. 85 (maximum interest rates); 12 U.S.C. 90 (security for the deposit of state funds).

[15] Petitioner's contrary reliance (Pet. Br. 47) on *Wichita Royalty Co.* v. *City National Bank*, 306 U.S. 103 (1939), and *California Federal Savings & Loan Association* v. *Guerra*, 479 U.S. 272 (1987), is misplaced. The claims in both of those cases were asserted by third parties. In *Wichita Royalty*, a depositor asserted a tort claim for individual relief against the bank's directors. *Guerra* involved a statutory claim brought against the savings association by a former employee.

[16] Federal credit unions also operate under federal charters, and their creation, corporate organization, and corporate powers are provided for by federal law. See, *e.g.*, 12 U.S.C. 1757 (corporate powers), 1758 (bylaws), 1761b (board of directors' meetings, powers, and duties). The National Credit Union Administration, an independent executive branch agency, is charged, *inter alia*, with issuing their charters and regulating their corporate practices. 12 U.S.C. 1752a. See generally 12 C.F.R. Pt. 701 (regulations governing organization and operation of federal credit unions).

1120, 1123 (7th Cir. 1994) (Easterbrook, J.) ("[The failed institution] held a federal charter, so national law governs the liability of officers and directors for their management."); *Murphy* v. *Colonial Fed. Sav. & Loan Ass'n*, 388 F.2d 609, 611-612 (2d Cir. 1967) (When state courts "deal with the internal affairs of federal savings and loan associations, * * * they are nonetheless applying federal law."); *RTC* v. *Farmer*, 823 F. Supp. 302, 307 (E.D. Pa. 1993) ("[T]he court does not reach the issue of whether Pennsylvania liabilty standards allow claims for simple negligence (and/or for breach of fiduciary duty) since the bank is federally chartered and is not incorporated under and regulated by state law."); *RTC* v. *Hess*, 820 F. Supp. 1359, 1362 (D. Utah 1993) ("Federal savings and loan institutions are federally chartered, federally regulated, federally insured, and federally organized. Such comprehensive coverage leaves little or no room for state law claims."); *RTC* v. *Gallagher*, 800 F. Supp. 595, 602 (N.D. Ill. 1992) ("[The institutions] were federally chartered, federally regulated, federally insured thrifts which were organized under federal law. * * * As a result, there is no basis for any state law claims in this case. Therefore, all claims will be construed as arising under federal law."), aff'd, 10 F.3d 416 (7th Cir. 1993).

2. The conclusion that federal law governs the duty of care owed by officers and directors to their federally chartered depository institutions is also supported by this Court's decision in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979). In that case, the United States had lent money and obtained contractual security interests through federal programs administered by the Small Business Administration (SBA) and the Farmers Home Administration (FmHA). The primary question was whether the priority of the government's liens as against competing private liens was governed by state or federal law. This Court thought it "clear that the priority of liens stemming from federal lending programs must be

determined with reference to federal law." *Id.* at 726.[17] In reaching that conclusion, the Court observed that, "[s]ince the [SBA and FmHA] derive their authority to effectuate loan transactions from specific Acts of Congress passed in the exercise of a 'constitutional function or power,' their rights, as well, should derive from a federal source." *Ibid.* (citation omitted). See also *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 366 (1943) (citations omitted) (Where the United States' "authority to issue [a] check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of * * * any * * * state[,] [t]he duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources.").[18]

Those principles apply with equal if not greater force in this case. National banks and federal savings associations are instrumentalities of the United States created for a public purpose. Their authority derives "from specific Acts of Congress passed in the exercise of a 'constitutional function or power.'" *Kimbell Foods,* 440 U.S. at 726. Their rights, duties, and powers and those of their constituent parts—their officers, directors and sharehold-

[17] The Court ultimately decided, however, that it was appropriate to incorporate state law as the federal rule of decision in the particular circumstances of that case, which presented "little need for a nationally uniform body of law." *Kimbell Foods,* 440 U.S. at 728-729.

[18] Similarly, in *United States* v. *Standard Oil Co., supra,* the Court concluded that it is a matter of federal law whether the United States may sue a tortfeasor who injured a soldier for funds expended on the solidier's pay and medical costs while the soldier was incapacitated: "Perhaps no relation between the government and a citizen is more distinctively federal in character than that between it and members of its armed forces. * * * [T]he scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority." 332 U.S. at 305-306 (citations and footnote omitted).

ers—derive wholly from federal statutes and are "in no way dependent" on the laws of any State. *Clearfield Trust,* 318 U.S. at 366. Moreover, while both *Kimbell Foods* and *Clearfield Trust* pitted the interests of the United States against the interests of third parties, matters of corporate governance (such as the standard of care owed by officers and directors) implicate only the competing interests of principals within federal depository institutions. The law of the United States, not any State's law, governs the internal affairs of those institutions.

3. Contrary to petitioner's argument (Pet. Br. 40-45), the fact that Congress has not expressly defined the duties owed by officers and directors of federally chartered depository institutions does not mean that state law is the source of those duties. When Congress enacted the National Bank Act in 1864 and HOLA in 1933, creating national banks and federal savings associations and empowering their officers and directors to manage them, it was firmly established at general common law that those directors and officers would owe a fiduciary duty of care to the institutions, the breach of which would be redressable by the institutions. See *Briggs,* 141 U.S. at 146 ("The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common law rule which renders every agent liable who violates his authority to the damage of his principal."); accord *Leach* v. *FDIC,* 860 F.2d 1266, 1270 (5th Cir.) (citation and footnote omitted) ("Section 93(a) of the National Bank Act as enacted in 1864 was not created in a vacuum. In this pre-*Erie v. Tompkins* era, it was commonly understood that there existed a general common law."), cert. denied, 491 U.S. 905 (1989). Congress not unreasonably left it to the courts, applying common law, to enforce those duties. "It is precisely when," as here, "Congress has not spoken in an area comprising issues substantially related to an established purpose of government operation * * * that *Clearfield* directs federal courts to fill the interstices of federal legislation."

Kimbell Foods, 440 U.S. at 727 (citations and internal quotation marks omitted).

B. The Federal Common Law Should Employ The Standard Of Care Enforced By The Chartering Authority—Here The OTS—As The Rule Of Decision In Civil Actions

There is no need in this case for the Court to determine the precise content of the federal common-law standard of liability applicable to officers and directors of federally chartered depository institutions. The court of appeals appropriately remanded the case for the district court to decide that issue in the first instance. In the event that this Court does address the matter, however, in our view federal common law should incorporate the fiduciary standard of care enforced by the federal chartering authority.

It is well-established that "[c]ontroversies directly affecting the operations of" federal programs, "although governed by federal law, do not inevitably require resort to uniform federal rules." *Kimbell Foods*, 440 U.S. at 727-728. Ordinarily, there must be a "significant conflict between some federal policy or interest and the use of state law * * * as a precondition for recognition of a federal rule of decision." *O'Melveny*, 114 S. Ct. at 2055 (citation omitted). There is abundant potential for such a conflict in this case.

1. The minimum degree of care demanded of officers and directors is a matter of policy that requires a careful balance between the need to provide a sanction (and remedy) for corporate mismanagement and the need to attract and retain competent managers. Ordinarily, it is up to each chartering sovereignty to formulate its own policies in that regard (by statute or common law) with respect to those entities operating under its charter. This Court's decision in *Kamen* is instructive in that regard. In that case, the Court deemed it appropriate to incorporate state law in defining the contours of the demand requirement in derivative suits brought under the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.* The Court's decision was motivated in large part by the considerable deference owed, in the absence of any conflicting national policy, to each State's prerogative to fashion rules directly affecting "the allocation of governing powers within the corporation[s]" that operate under its charter. 500 U.S. at 101. Cf. *Burks*, 441 U.S. at 478 (holding that state law should be used as the federal rule governing the power of disinterested directors of mutual funds to terminate derivative suits brought under federal statutes, in part because "[m]utual funds * * * are incorporated pursuant to state, not federal, law"). The Court explained in *Kamen* that "[s]uperimposing a [uniform] rule of universal-demand over the corporate doctrine of these States would clearly upset the balance that they have struck between the power of the individual shareholder and the power of the directors to control corporate litigation." 500 U.S. at 103. Superimposing *state* standards of fiduciary responsibility over standards developed by a *federal* chartering authority would similarly, and equally clearly, "upset the balance" that the federal chartering authority may "str[ike] between the power[s]" of an institution under its charter and that institution's directors and officers.

2. The OTS is authorized, upon notice and an administrative hearing, to assess civil money penalties against and/or remove from office thrift officers and directors for certain breaches of fiduciary duties.[19] In the course of

[19] See 12 U.S.C. 1818(i)(2)(B) (authorizing civil penalty of $25,000 per day for breaches of fiduciary duty that (i) are part of a pattern of misconduct, (ii) cause or are likely to cause more than a minimal loss to the institution, or (iii) result in pecuniary gain to the defendant); 12 U.S.C. 1818(i)(2)(C) (authorizing civil penalty of $1 million per day for breaches of fiduciary duty if the defendant knowingly or recklessly causes substantial loss to

such proceedings, the OTS, applying the ordinary-care standard articulated by this Court in *Briggs*, see *In re Simpson*, OTS Order No. AP 92-123 (Nov. 18, 1992), slip op. 21-22, aff'd, 29 F.3d 1418 (9th Cir. 1994), cert. denied, 115 S. Ct. 1096 (1995),[20] has spoken authori-

the institution); see also 12 U.S.C. 1818(e) (authorizing removal of director or officer for breach of fiduciary duty where breach (i) causes or could cause more than minimal financial loss to the institution, (ii) prejudices the interests of depositors, or (iii) results in financial gain to the defendant, if the breach involves personal dishonesty or demonstrates willful or continuing disregard for the safety and soundness of the institution).

[20] The FHLBB first received express authority, under 12 U.S.C. 1730(g)(1) (1988), to take enforcement action against directors and officers of federally insured depository institutions for breach of fiduciary duty in 1966. Pub. L. No. 89-695, 102(a), 80 Stat. 1039. At that time, there was a general consensus among state and federal courts that the duty of care owed by officers and directors was the ordinary-care standard articulated in *Briggs*. See, *e.g.*, *Neese* v. *Brown*, 405 S.W.2d 577, 581 (Tenn. 1964) ("From our very thorough study of the matter we have concluded that there is no appreciable conflict of opinion among the courts as to the liability of directors[.] * * * [T]he test as to whether or not a director is liable depends upon whether or not he has used reasonable care and diligence in carrying out his duties.") (citing, *inter alia*, *Briggs*, 141 U.S. at 132); accord *Graham* v. *Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963). Absent any evidence that Congress intended otherwise, the statutory term "fiduciary duty" should be construed in accordance with that general understanding. See *Field* v. *Mans*, 116 S. Ct. 437, 443 (1995) ("It is . . . well established that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'"); see also *id.* at 443 n.9 ("We construe the [statutory] terms * * * to incorporate the general common law * * *, the dominant consensus of common-law jurisdictions, rather than the law of any particular State."). To the extent that issues arise upon judicial review of an enforcement proceeding requiring a further elaboration of the meaning of "fiduciary duty," the reasonable views of the relevant federal regulatory agency should be given "controlling weight." *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813-814 (1995).

tatively respecting the duty of care owed by directors and officers to federal savings associations. See, *e.g.*, *In re Simpson*, slip op. 21-22 (explaining duty of care); *In re O'Keeffe*, OTS Order No. AP 90-661 (Apr. 26, 1990), slip op. 18-23 (explaining duties of loyalty and care).[21] The OTS has explained that, in today's thrift industry, ordinary care requires, among other things,

> selecting, monitoring and evaluating competent management; establishing business strategies and policies; monitoring and assessing the program of business operations; establishing and monitoring adherence to policies and procedures required by statute, regulations and principles of safety and soundness; and making business decisions on the basis of fully informed and meaningful deliberations.

In re Simpson, slip op. 22; *In re O'Keeffe*, slip op. 19-21. Moreover, because thrift "[o]fficers are responsible for the day to day management of the institution," "an 'inside' director, such as [petitioner], generally has greater knowledge of, and direct responsibility for, the management of the institution." *In re Simpson*, slip op. 23.[22]

[21] The OTS has also published substantial informal guidance respecting the duties of officers and directors. See Office of Thrift Supervision, *Statement Concerning the Responsibilities of Directors and Officers of Insured Depository Institutions* (1992); Office of Thrift Supervision, *Regulatory Handbook on Thrift Activities*, Section 140 (1990); Office of Thrift Supervision, *Director Information Guidelines* (1989); see also Federal Home Loan Bank Board, Memorandum R-62, *Accountability of Directors and Officers; Policy Statement*, 52 Fed. Reg. 22,682 (1987).

[22] Compare, *e.g.*, *In re Vasa*, OCC No. AA-EC-94-28, 81 Fed. Res. Bull. No. 12, at 1171 (Oct. 10, 1995) (Federal Reserve Board decision affirming administrative law judge's finding that national bank directors' duty of care requires proper supervision of subordinates, knowledge of banking laws, and constant concern for bank's safety and soundness); *In re Greenberg*, OCC No. AA-EC-90-45, 1991 OCC Enf. Dec. LEXIS 511, at *77-*78 (Oct. 28, 1991) (Federal Reserve Board Decision holding that "fiduciary dut[ies] of officers and directors of federally chartered institutions are determined by federal common law," and observing that, "[g]iven

3. Congress delegated to the OTS the responsibility to provide for the "safe and sound operation" of federal savings associations. 12 U.S.C. 1463(a)(1); *de la Cuesta*, 458 U.S. at 160-163. The courts should respect the policy choices that the OTS has made, expressly or implicitly, in determining the degree of care and the particular duties owed by thrift officers and directors. In cases (like this case) that involve breach of duty claims against directors or officers of federal savings associations, the courts should thus incorporate the fiduciary standards enforced by the OTS as the federal common law rule of decision. The duty of care owed by a director or officer will, in that event, be the same irrespective of whether the issue arises in the context of an administrative proceeding charging a breach of fiduciary duty under Section 1818 or in a private civil action.[23] The alternative favored by petitioner

the importance of the banking system, 'officers and directors of banking corporations generally owe a greater duty [of care] than other corporate officers and directors' "), aff'd, *Greenberg* v. *Board of Governors of Federal Reserve System*, 968 F.2d 164 (2d Cir. 1992). See also Office of the Comptroller of the Currency, *The Director's Book* 56 (Aug. 1987) ("The common law holds an individual bank director to a standard of care in performing the job equal to that which a reasonable and prudent person in a like position would exercise in similar circumstances.").

[23] It should make no difference whether the civil claim is pleaded in the language of negligence or that of breach of duty. "[C]ases * * * use negligence and gross negligence as concepts to aid in interpreting the duty owed" to the corporation. *Louisiana World Exposition* v. *Federal Ins. Co.*, 864 F.2d 1147, 1150 (5th Cir. 1989). See 3 Beth Buday & Gail O'Gradney, *Fletcher Cyc. Corp., supra*, § 990, at 696 ("The liability of officers to the corporation for damages caused by negligent or unauthorized acts rests upon the common-law rule which renders every agent liable who violates his or her authority or neglects his or her duty to the damage of the principal."); *e.g.*, *Hess*, 820 F. Supp. at 1366 ("In Utah, the fiduciary duty of care is simply the level of care state law requires a director to exercise in managing corporate affairs. That is the identical standard of ordinary negligence which underlies a claim for negligent mismanagement."); *Smith* v. *Van Gorkom*, 488 A.2d 858, 872-873

(Pet. Br. 48)—application in private civil actions of state-law standards of liability—would undermine the OTS's ability to implement its own coherent and uniform regulatory policy, contrary to the intent of Congress, which "plainly envisioned that federal savings and loans would be governed by what the [OTS]—not any particular State—deemed to be the 'best practices.'" *de la Cuesta*, 458 U.S. at 161.

II. SECTION 1821(k) DOES NOT SUPPLANT THE FDIC'S RIGHT, AS RECEIVER, TO ASSERT A FEDERALLY CHARTERED INSTITUTION'S FEDERAL COMMON-LAW CLAIMS AGAINST ITS OFFICERS AND DIRECTORS

The starting point for determining the rights of the FDIC as receiver is 12 U.S.C. 1821(d)(2)(A)(i), which provides that "[t]he [FDIC] shall, * * * by operation of law, succeed to * * * all rights, titles, powers, and privileges of the insured depository institution." By force of that provision, "the FDIC as receiver 'steps into the shoes' of [a] failed [insured depository institution], obtaining the rights '*of* the insured depository institution' that existed prior to receivership." *O'Melveny*, 114 S. Ct. at 2054 (quoting *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 585 (1989)).[24] In *O'Melveny*,

(Del. 1985) (treating a claim for breach of fiduciary duty of care under Delaware law as a claim sounding in negligence).

[24] Section 1821(d)(2)(A)(i) clarified, but did not substantively alter, preexisting law. At the time FIRREA was enacted, as now, Section 192 provided, with regard to national banks, that a receiver appointed by the Comptroller is to "take possession of the books, records, and assets of every description of [the] association." 12 U.S.C. 192. Section 1821(d) provided that, when the FDIC served as receiver, it had "all the rights, powers, and privileges now possessed by or hereafter granted by law to a receiver of a national bank." 12 U.S.C. 1821(d) (1988). With regard to federal thrifts, Section 1729 authorized and directed the Federal Savings and Loan Insurance Corporation, as receiver, to "take

this Court stated that Section 1821(d)(2)(A)(i) "places the FDIC in the shoes of [an] insolvent [state-chartered, federally insured depository institution], to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise." 114 S. Ct. at 2054. By the same token, in this case, absent any provision of FIRREA that provides otherwise, the FDIC stands in City Federal's shoes and possesses the right to assert City Federal's federal common-law claims against its former officers and directors.

Section 1821(k) unquestionably modifies the rights of the FDIC as receiver with respect to suits against the former officers and directors of failed institutions. Its first sentence provides that "[a] director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by * * * the [FDIC] * * * for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence)." Section 1821(k) thereby ensures the FDIC's ability to assert claims based on gross negligence, regardless of whether the institution would have had the right to assert such claims on its own behalf before its demise. Section 1821(k)'s second sentence (the savings clause) then states that nothing in Section 1821(k) "shall impair or affect any right of the [FDIC] under other applicable law." *Ibid.*

Petitioner argues (Pet. Br. 14-32) that, despite the savings clause, Section 1821(k) creates an exclusive gross-negligence standard of liability for suits by the FDIC as receiver against officers and directors of federally chartered institutions, which supplants the FDIC's right to sue such officers or directors under any more stringent standard of liability (such as simple negligence) that might apply as a matter of federal common law in a suit brought

over the assets" of the association and "liquidate its assets in an orderly manner." 12 U.S.C. 1729(b)(1)(A)(i) and (v) (1988).

by an institution on its own behalf. In his view, Section 1821(k) insulates officers and directors of federally chartered depository institutions from liability to the FDIC under the federal common-law standard that governed their conduct while they were serving as officers and directors and under which they could have been held liable in a suit brought against them by the institution before its demise. That would be an odd result, given Congress's stated desire through FIRREA to strengthen "the enforcement powers of Federal regulators of depository institutions" and "the civil sanctions * * * for defrauding or otherwise damaging depository institutions." Pub. L. No. 101-73, § 101(9)-(10), 103 Stat. 187 (1989).[25] In any event, the text, structure, and legislative history of the statute demonstrate, contrary to petitioner's view, that Section 1821(k) provides the FDIC with the option of pursuing statutory claims for gross negligence, while preserving its ability to assert any other claims that it might possess as receiver.

A. The Text And Structure Of Section 1821(k) Demonstrate That It Does Not Supplant The FDIC's Right To Assert A Federal Institution's Own Federal Common-Law Claims

Petitioner recognizes that Congress is presumed not to have intended through Section 1821(k) to supplant the FDIC's preexisting authority, as receiver, to pursue a federally chartered institution's federal common-law claims. Pet. Br. 15-16. He argues (*ibid.*), however, that, since Section 1821(k) authorizes suit against officers and directors for gross negligence, the statute "speaks directly" to a standard of liability for such officers and directors and thereby supplants any standard otherwise applicable under

[25] See also 135 Cong. Rec. 7155 (1989) (statement by Senator Roth: Section 1821(k) is "surgically designed to protect the Federal interest, the taxpayers' interest, and no other"); *ibid.* (statement by Senator Garn: the purpose of Section 1821(k) is to "protect[] the insurance fund").

federal common law. The "speaks directly" formulation is, in certain circumstances, an appropriate way to conceptualize the inquiry as to whether Congress intended to supplant preexisting common law. See, *e.g.*, *United States* v. *Texas*, 507 U.S. 529, 534 (1993). It is not a mechanism by which to avoid that inquiry altogether. Section 1821(k) plainly authorizes the FDIC to sue officers and directors of federally chartered institutions for gross negligence. The question is whether Section 1821(k) *limits* the FDIC to that remedy, or whether it instead *empowers* the FDIC, at a minimum, to sue for gross negligence, while *preserving* the FDIC's right, in addition, to assert any federal common-law claims to which it may succeed as receiver.

Judging from its text and structure, Section 1821(k) is not a limiting provision. Enacted in reaction to the States' codification of so-called "insulating statutes" that protected officers and directors from suit for all but knowing or intentional misconduct (see pp. 36-41, *infra*), Section 1821(k) is most naturally read as expanding the FDIC's rights by establishing a minimum standard of liability applicable in its suits against officers and directors of failed federally insured institutions: It authorizes suit by the FDIC for gross negligence regardless of whether the institution could itself have asserted a claim for gross negligence, *O'Melveny*, 114 S. Ct. at 2054, while expressly preserving (through its savings clause) the FDIC's right to assert whatever claims the institution could have brought on its own behalf.

1. The first sentence of Section 1821(k) authorizes the FDIC as receiver to recover money damages in a civil action for the "gross negligence, including * * * conduct that demonstrates a greater disregard of a duty of care (than gross negligence)" of an officer or director of a federally insured depository institution. Nothing in the text of that sentence purports to restrict the FDIC from asserting an institution's own claims for ordinary negligence in circumstances where such claims could have been made by the institution on its own behalf. If Congress

had so intended, it could easily have so provided by stating that a director or officer "may be held personally liable * * * *only* for gross negligence * * *" (or "may not be held liable * * * except for gross negligence * * *"). See *FDIC* v. *Canfield*, 967 F.2d 443, 446 (10th Cir.) (en banc) (citing *Rose* v. *Rose*, 481 U.S. 619, 626-627 (1987) ("may" establishes only discretionary power)), cert. dismissed, 506 U.S. 993 (1992); *FDIC v. McSweeney*, 976 F.2d 532, 537 (9th Cir. 1992), cert. denied, 113 S. Ct. 2440 (1993).

Petitioner concedes that Section 1821(k) does not affirmatively state that the FDIC may not sue directors and officers of federally chartered institutions for conduct less culpable than gross negligence, but he argues that the first sentence makes that point by negative implication. In petitioner's view, the authorization to sue based on gross negligence (or conduct that reflects an even greater disregard of a duty of care) implies an absence of authority to sue for violation of "a *lesser* disregard of a duty of care," such as simple negligence. Pet. Br. 18-19.[26] Even in the absence of an express savings clause, that argument would carry little (if any) weight, because Section 1821(k) clearly is not the primary source of the FDIC's authority

[26] More precisely, petitioner's current position appears to be that Section 1821(k) supplants the FDIC's ability to assert a federal depository institution's claims under federal common law, but preserves the FDIC's ability to assert a state-chartered depository institution's claims based on state statutory or common law. Pet. Br. 25 n.12. The difference, petitioner explains, lies in the fact that the presumption against supplanting federal common law is weaker than the presumption against preempting state law. *Id.* at 15 (quoting *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 316-317 (1981)); accord *RTC* v. *Frates*, 52 F.3d 295, 296-297 (10th Cir. 1995). Those presumptions, however, are merely tools for divining the meaning of statutory text. The text of Section 1821(k) affords no basis for treating the FDIC's authority to assert a state-chartered institution's state-law claims any differently from the FDIC's authority to assert a federally chartered institution's federal common-law claims. See also pp. 32-34, *infra* (discussing savings clause).

to pursue civil actions against officers and directors. Instead, the FDIC's authority derives primarily from its long-standing right as receiver, now codified at 12 U.S.C. 1821(d)(2)(A)(i), to succeed to all causes of action possessed by the depository institution. If Congress had intended to bar the FDIC from asserting a federally chartered institution's federal common-law causes of action for ordinary negligence to which the FDIC would otherwise succeed under Section 1821(d)(2)(A)(i), it is extremely doubtful that Congress would have signalled that intent via a negative implication from a positive grant of authority in Section 1821(k). Section 1821(k) is more naturally interpreted as a pure supplement to Section 1821(d)(2)(A)(i): Section 1821(k) permits the FDIC to sue directors and officers for gross negligence even in cases where (because of a state insulating statute) the institution could not itself have asserted a claim for gross negligence.[27]

2. To the extent that Section 1821(k)'s substantive provision leaves any room for doubt, the savings clause makes clear that Congress had no intention to "impair or affect any right of the [FDIC] under other applicable law." 12 U.S.C. 1821(k). That language means what it says: Section 1821(k)'s authorization of suits for gross negligence does not affect the FDIC's right to assert any other claims that it holds as receiver under other applicable law. Petitioner, however, argues that "other applicable law" refers only to other sections of FIRREA and to state statutory and common law. Pet. Br. 19-22.

The question in this case regarding the meaning of "other applicable law" is similar to the issue presented

[27] Contrary to petitioner's view (Pet. Br. 18-19), Section 1821(k)'s specific reference to "conduct that demonstrates a greater disregard of a duty of care (than gross negligence)" adds nothing to his negative-implication argument. The phrase makes clear that Section 1821(k) only empowers the FDIC to sue for gross negligence or more culpable conduct. It does not say that the FDIC may not sue for lesser breaches of duty if empowered to do so by other applicable law.

in *Patterson* v. *Shumate*, 504 U.S. 753 (1992). In that case, a bankruptcy trustee attempted to recover for a debtor's estate the debtor's interest in a pension plan. Section 541(c)(2) of the Bankruptcy Code, however, excludes from the debtor's estate property that is subject to a restriction on transfer under "applicable nonbankruptcy law," 11 U.S.C. 541(c)(2), and the pension plan in *Patterson* contained an anti-alienation provision required for tax qualification under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* The trustee argued that "applicable nonbankruptcy law" referred only to state law. This Court rejected that interpretation. It found the plain meaning of the phrase "applicable nonbankruptcy law" determinative:

> The natural reading of the provision entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law. Nothing in [11 U.S.C.] 541 suggests that the phrase "applicable nonbankruptcy law" refers * * * exclusively to *state* law. The text contains no limitation on "applicable nonbankruptcy law" relating to the source of the law.
>
> * * * * *
>
> * * * Plainly read, the provision encompasses *any relevant nonbankruptcy law*, including federal law such as ERISA.

504 U.S. at 758-759 (emphasis added). Noting that the Bankruptcy Code elsewhere contains several specific references to state law, the Court concluded that "Congress' decision to use the broader phrase 'applicable nonbankruptcy law' in § 541(c)(2) strongly suggest[ed] that it did not intend to restrict the provision in the manner that [the trustee] contend[ed]." *Id.* at 758.

For those same reasons, the phrase "other applicable law" in Section 1821(k) means—as the words strongly suggest—*any* other applicable law, whether state or federal. When Congress intended elsewhere in Section 1821

to refer only to the laws of particular jurisdictions or other provisions of FIRREA, it did so expressly. See, *e.g.*, 12 U.S.C. 1821(c)(3)(B) ("powers imposed by State law"); 12 U.S.C. 1821(e)(3)(C)(ii) ("except as otherwise specifically provided in this section"); 12 U.S.C. 1821(g)(4) ("determined in accordance with the applicable provisions of State law"). As in *Patterson*, the absence of specific limiting terms in Section 1821(k) "strongly suggests that [Congress] did not intend to restrict the provisions" to state law. 504 U.S. at 758.[28]

3. Contrary to petitioner's argument (Pet. Br. 20-21), a literal reading of the savings clause does not rob Section 1821(k)'s substantive provision of its intended meaning.[29] If, as its language provides, the savings clause preserves the FDIC's option to pursue claims based on ordinary negligence (or other culpable conduct) where applicable state or federal law so permits, the substantive provision does significant service by ensuring the FDIC's ability to pursue claims for gross negligence where other applicable law does not so permit. Contrary to petitioner's view (*id.* at 21), there is nothing "nonsensical" in providing the federal receiver with both the guaranteed ability to sue for gross negligence and the option of pursuing claims based on less culpable conduct where "other applicable law" allows.[30]

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[28] Nor is the term "other applicable law" reasonably interpreted to refer solely to statutory, as opposed to common, law. See *Norfolk & Western Ry.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991) (the phrase "all other law, including State and municipal law," "does not admit of [a] distinction * * * between positive enactments and common-law rules of liability").

[29] That would be true only if the substantive provision was intended to establish the exclusive standard of liability for officers and directors of federally and state-chartered institutions. If that were its intended meaning, the savings clause would not have been enacted.

[30] Indeed, although petitioner argues that state, rather than federal, law governs suits by federally chartered institutions against their officers and directors, he agrees that Congress afforded the FDIC the ability to pursue claims both under the standard of liability created by Section 1821(k) and under the standard that would have been applicable in a suit brought by the institution in its own right. Pet. Br. 25 n.12 (FDIC may sue "directors and officers for gross negligence even though the applicable state law would otherwise require a higher standard, and * * * sue for simple negligence in those relatively few states that have adopted a simple negligence standard").

It is true that Section 1821(k)'s authorization of suits for gross negligence may not afford the FDIC any practical advantage insofar as federally chartered institutions are concerned, because the FDIC already has the ability to sue officers and directors of federally chartered institutions for negligence under federal common law. Congress's inclusion of officers and directors of federally chartered institutions within the scope of Section 1821(k) (through its use of the broad term "insured depository institution") is reflective, in our view, of Congress's limited aims. As explained below, pp. 36-41, *infra*, Congress's goal was to prevent the States' then-recent enactments of statutes insulating officers and directors from liability from unduly restricting the FDIC's ability to sue the officers and directors of failed federally insured institutions for damages resulting from their dereliction of duty. At the time, the question of what law (state or federal) applied to which institutions was unresolved,[31] and Congress wanted to en-

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[31] Most courts concluded that federal common law applied to federally chartered institutions. See p. 14 & n.9, *supra*. Some courts applied state law to federally chartered thrifts, generally without any analysis of whether state law applied directly or as the appropriate rule of decision under federal law. *E.g.*, *Borgsmiller* v. *Burroughs*, 542 N.E.2d 1281 (Ill. App. Ct.), appeal denied, 548 N.E.2d 1066 (Ill. 1989); *First Nat'l Bank* v. *Hall*, 238 S.E.2d 284 (Ga. Ct. App. 1977); *Broadway Fed. Sav. & Loan Ass'n* v. *Howard*, 285 P.2d 61 (Cal. Ct. App. 1955). With regard to state-chartered institutions, some courts applied federal common law on the ground that the institutions were federally insured, *e.g.*, *FSLIC* v. *Sajovich*, 642 F. Supp. 74, 77 (C.D. Cal. 1986); *First Hawaiian Bank* v. *Alexander*, 558 F. Supp. 1128, 1131-1132 (D. Haw. 1983), while others held that state law applied, *e.g.*, *FSLIC* v. *Capozzi*,

sure that, at a minimum, grossly negligent officers and directors who were responsible for savings and loan failures would pay for the costs of their mismanagement. Having provided through Section 1821(k) that the FDIC would always have the option of a suit for gross negligence, Congress left it to the courts to determine what "other * * * law" applying a stricter standard of liability might also be applicable.

B. The Legislative History Confirms That The Purpose Of Section 1821(k) Was To Expand, Not To Contract, The Rights Of The FDIC As Receiver

The legislative history of Section 1821(k) confirms the clear meaning of the text. That history reveals that Congress was concerned about the enactment by numerous States of so-called "insulating statutes." Those statutes shield officers and directors from liability for certain breaches of fiduciary duty.[32] Congress was concerned that such statutes would frustrate the ability of the federal receiver to recover damages from officers and directors of failed federally insured depository institutions for losses resulting from their mismanagement. Contrary to petitioner's argument (Pet. Br. 29), the legislative history reveals no intention on the part of Congress to eliminate,

855 F.2d 1319, 1325-1326 (8th Cir. 1988), vacated on other grounds, 490 U.S. 1062 (1989).

[32] See, *e.g.*, Ind. Code Ann. § 23-1-35-1(e)(2) (Burns 1995) (directors not liable unless conduct amounts to at least "willful misconduct or recklessness"); Fla. Stat. Ann. § 607.0831(5) (West 1993) ("recklessness or an act or omission which was committed in bad faith or with malicious purpose"); Ohio Rev. Code Ann. § 1701.59(D) (Anderson 1992) ("deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation"); Del. Code Ann. tit. 8, § 102(b)(7) (Supp. 1994) (authorizing shareholders to opt out of Delaware's common-law standard by adopting provisions that limit a director's liability to illegal acts or omissions, breaches of the duty of loyalty, or intentional wrongdoing); Cal. Corp. Code § 204(a)(10) (West 1990) (same).

or restrict in any way, the FDIC's right to sue officers and directors of federally chartered depository institutions under federal common law.

Section 1821(k) originated in the Senate. The initial Senate bill provided:

> Notwithstanding any provision of State law, a director or officer of an insured financial institution may be held personally liable for monetary damages in any civil action by * * * [the FDIC] * * * for any cause of action available at common law, including, but not limited to, negligence, gross negligence, willful misconduct, breach of fiduciary duty, breach of contract, conversion, fraud, waste of corporate assets, and violations of statutes.

S. 774, 101st Cong., 1st Sess. § 214(n) (1989). That version of the Senate bill would explicitly have preempted any state statute that restricted in any way the causes of action that were available at common law. The bill was amended by its managers on the Senate floor, however, to limit its preemptive effect. As amended, the bill provided:

> A director or officer of an insured financial institution may be held personally liable for monetary damages in any civil action by * * * [the FDIC] * * * for gross negligence or intentional tortious conduct * * *.

See S. Rep. No. 19, 101st Cong., 1st Sess. 105-106 (1989). At the same time, a savings clause was introduced, which stated:

> Nothing in this paragraph shall impair or affect any right, if any, of the [FDIC] that may have existed immediately prior to the enactment of the FIRRE Act.

Id. at 106.

Senator Riegle, the bill's floor manager, explained the purpose of the provision, and the reason for its amendment, as follows:

In recent years, many States have enacted legislation that protects directors or officers of companies from damage suits. These "insulating" statutes provide for various amounts of immunity to directors and officers. For example, in Indiana, a director or officer is liable for damages only if his conduct constitutes "willful misconduct or recklessness."

The reported bill totally preempted State law in this area with respect to suits brought by the FDIC against bank directors or officers. However, in light of the State law implications raised by this provision, the managers' amendment scales back the scope of this preemption.

Under the managers' amendment, State law would be overruled only to the extent it forbids the FDIC to bring suit based on "gross negligence" or an "intentional tort."

135 Cong. Rec. 7152-7153 (1989).

Senator Sanford voiced appreciation for the managers' amendment, explaining that the language of the revised bill met his concern that Congress not interfere unduly with legitimate state policies:

> The bill as drafted would have preempted numerous State laws which provided limited indemnification for directors and officers. These State laws were enacted largely in response to problems faced by corporations in attracting good officers and directors. * * *
>
> The amendment which the managers have accepted modifies the bill to preempt State law only in a very limited capacity. The amendment would permit the FDIC to bring an action or direct others to bring an action against the directors and officers of a financial institution if the director or officer acted with gross negligence or committed an intentional tort.
>
> * * * [T]he preemption of State law permitted by this bill is limited solely to those institution [*sic*] that have Federal deposit insurance and to those cases in which the directors or officers have committed intentional torts or acts of gross negligence.

> * * * It is not a wholesale preemption of longstanding principles of corporate governance * * *.

135 Cong. Rec. 7150-7151 (1989). Senator Roth (one of FIRREA's sponsors) clarified the nature of the Senators' federalism concerns: "[S]ection 214(n) as modified does no violence to *State interests in governing corporations they may create.*" *Id.* at 7155 (emphasis added).

Consistent with the views expressed on the Senate floor, the Senate Report provides:

> New section (n) enables the FDIC to pursue claims against directors or officers of insured financial institutions for gross negligence (or negligent conduct that demonstrates a greater disregard of a duty of care than gross negligence) or for intentional tortious conduct. This right supersedes State law limitations that, if applicable, would bar or impede such claims. *This subsection does not prevent the FDIC from pursuing claims under State law or under other applicable Federal law, if such law permits the officers or directors of a financial institution to be sued (1) for violating a lower standard of care, such as simple negligence, or (2) on an alternative theory such as breach of contract or breach of fiduciary duty.*

S. Rep. No. 19, *supra*, at 318 (emphasis added).[33]

[33] Petitioner argues that the Senate Report should be paid little heed because it was not available at the time the Senate voted on the managers' amendment. Pet. Br. 30-31 (citing *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 407 (1987)). Petitioner's reliance on *Clarke* is unavailing. In that case, the legislative history in question was a statement by Representative McFadden that had been placed into the Congressional Record ten days after the McFadden Act was enacted. 479 U.S. at 407. Here, as petitioner concedes (Pet. Br. 31), the Senate Report was available six weeks before Congress enacted FIRREA.

Petitioner also argues (Pet. Br. 31 n.15) that the Senate Report's statement regarding the preservation of the FDIC's rights under "other applicable Federal law" likely encompassed the ad-

The language of the provisions adopted by the Senate was incorporated into the House of Representatives' version of Section 1821(k), except for minor technical changes (principally in the savings clause) made by the House.[34] The House's version was enacted into law without significant debate either in the House or in the Conference Committee. Although petitioner places heavy reliance on the Conference Report (Pet. Br. 29-30), that report does not contradict the Senate Report or otherwise support petitioner's assertion that Congress intended to create an exclusive standard of liability for cases involving officers and directors of federally chartered institutions. It provides:

> Title II preempts State law with respect to claims brought by the FDIC in any capacity against officers or directors of an insured depository institution. The preemption allows the FDIC to pursue claims for gross negligence or any conduct that demonstrates a

ministrative enforcement provisions of FIRREA and other federal statutes, but not federal common law. Because the Senate Report was discussing the provision's effect on the FDIC's ability to pursue civil claims in its capacity as receiver, it is unlikely that the provision's reference to "claims" had anything to do with the FDIC's authority, in its corporate capacity, to bring administrative enforcement actions. We agree that the Senate Report's reference was intended to include, among other things, civil claims against officers and directors under federal statutes, such as the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* In our view, the Report means what it says—Section 1821(k) was not intended to supplant the FDIC's rights under "other applicable Federal law." There is no reason to suppose that the reference to "other applicable Federal law" excludes applicable federal common law.

[34] Whereas the Senate's version of the savings clause used the phrase "any right, if any, of the [FDIC] that may have existed immediately prior to the enactment of the FIRRE Act," S. Rep. No. 19, *supra*, at 106, the language passed by the House and enacted by Congress reads "any right of the [FDIC] under other applicable law," 12 U.S.C. 1821(k). Petitioner concedes that that change in wording has no substantive implications. Pet. App. A17 n.12.

> greater disregard of a duty of care, including intentional tortious conduct.

H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 398 (1989). Just as Section 1821(k) provides that officers and directors "may" be held liable for gross negligence in suits by the FDIC, the Conference Report states that the statute "allows" the FDIC to sue officers and directors for gross negligence. The language of the Conference Report does not support petitioner's argument that the FDIC may *only* sue officers and directors of federally chartered institutions for gross negligence or more culpable conduct.

The legislative history of Section 1821(k) thus confirms the text of the provision: Congress intended to preempt state insulating statutes to ensure that, at a minimum, the FDIC as receiver may sue officers and directors of federally insured depository institutions for their gross negligence. Nothing in the legislative history suggests that Congress intended to limit in any way the FDIC's right to assert any claims against officers and directors to which it succeeds as receiver.[35]

[35] At the time FIRREA was enacted, directors and officers in a number of States were subject to an ordinary-negligence standard of care. See, *e.g.*, *Medford Trust Co.* v. *McKnight*, 197 N.E. 649, 655 (Mass. 1935) (bank directors "are liable for negligence in the performance of those responsibilities even though they have acted in good faith"); *Omnibank of Mantee* v. *United Southern Bank*, 607 So. 2d 76, 84-86 (Miss. 1992) (affirming judgment against bank officer for "negligently extend[ing] credit" to insolvent borrowers); *Neese* v. *Brown*, 405 S.W.2d at 580 ("It is generally held that the liability of the directors and other officers of a corporation is not limited to wilful breaches of trust or excessive power but also extends to negligence."); *FDIC* v. *Berry*, 659 F. Supp. 1475, 1481 (E.D. Tenn. 1987) (bank directors may be held responsible "upon a finding of negligent handling of the bank's affairs").

CONCLUSION

The decision of the Third Circuit should be affirmed.

Respectfully submitted.

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No. 95-928

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JOHN W. ATHERTON, JR.,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR CITY SAVINGS, F.S.B.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

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August 30, 1996

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SUMMARY OF ARGUMENT

It is petitioner's position that, when the FDIC in its capacity as conservator or receiver of a failed federally chartered savings association sues the former directors and officers of that association for breach of their duty of care, it may assert a federal claim for gross negligence under 12 U.S.C. § 1821(k) or, if available, it may assert a state claim for simple negligence under the law of the state where the association has its principal place of business. The FDIC acknowledges that it has a § 1821(k) claim; but, in stark contrast to the position it has taken in other cases including, most recently, *FDIC v. Stahl*, 89 F.3d 1510 (11th Cir. 1996), the FDIC now argues that state law claims will not lie against the directors and officers of federally chartered associations because of the internal affairs doctrine pursuant to which courts resolve conflicts-of-law issues in cases involving the relations among or between a corporation, its directors, officers and shareholders, by applying the law of the state in which the corporation is incorporated. The FDIC maintains that in the case of a federally chartered association, it may not only sue officers and directors under § 1821(k) but that federal judges may also apply a simple negligence liability standard as a matter of federal common law.

The FDIC fails to satisfy either of the two necessary preconditions to the application of federal common law. It has identified neither any unique federal interest that would warrant the application of a federal common law liability standard nor any significant conflict between any such federal interest and the use of applicable state law liability standards for directors and officers. Even where a unique federal interest exists, the presence of such a conflict is "uniformly require[d] . . . as a precondition for recognition of a federal rule of decision." *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2055 (1994). The internal affairs doctrine is not an impediment to the maintenance of state law breach of duty claims against the directors and officers of federally chartered institutions. This Court and many lower courts (often at the FDIC's own urging) have recognized that federal law is not the exclusive source of law respecting the internal affairs of corporations merely because they are federally chartered. And, in any event, § 1821(k) supplants any federal common law simple negligence liability standard that otherwise might exist.

ARGUMENT

I. PETITIONER HAS ADEQUATELY RAISED THE ISSUE OF THE APPLICABILITY OF FEDERAL COMMON LAW

The FDIC suggests that the Court may not wish to address the issue of whether federal common law governs the liability of directors and officers of federally chartered savings institutions because petitioner allegedly first raised that issue in his opening brief. (FDIC Br. 7, 9-12.) The FDIC's position is factually misguided. The second of the Questions Presented in the Petition for a Writ Of Certiorari (Petition) is "[w]hether the court of appeals erred in concluding that Section 1821(k) . . . has *no* application whatsoever to [FDIC] actions against officers and directors of failed *federally* chartered FDIC insured institutions, *and that the liability of officers and directors of such institutions is instead governed exclusively by 'federal common law.'* (Pet. i (last emphasis added).) This directly raises the issue of the applicability of federal common law. At the least, the issue is "fairly included" in the question presented. *See* Sup. Ct. R. 14.1(a).

To leave no doubt, immediately following the second of the Questions Presented, the following statement appears: "[T]he decision of the court of appeals is in irreconcilable conflict with . . . (iii) this Court's well-established prior rulings concerning the creation and application of 'federal common law,' including especially this Court's recent decision in *O'Melveny & Myers v. FDIC* . . . ." (Pet. i.) Moreover, the second of the "Reasons For Granting The Writ" is that "the [court of appeals's] conclusion that 'federal common law,' instead of Section 1821(k), supplies the applicable law in this case violates this Court's longstanding rules respecting the creation and application of such judge-made law . . . ." (Pet. 8.) And the entire section II of the Petition (Pet. 16-20) is devoted to the following subject: "The Third Circuit's Decision Is In Direct Conflict With This Court's Prior Rulings Respecting The Application Of 'Federal Common Law,' And Particularly Its Recent Decision In *O'Melveny & Myers v. FDIC*." (Pet. 16.) Petitioner has thus amply raised the issue of the applicability of federal common law.

Even if the Petition had only presented the question whether § 1821(k) supplants a federal common law liability standard, it

would still be appropriate for the Court to first ascertain whether such a standard exists.[1] In *Lebron v. National Railroad Passenger Corp.*, the Court considered whether Amtrak is a government actor rather than a private entity even though petitioner there "did not raise [the] point below; indeed, he expressly disavowed it in both the District Court and the Court of Appeals." 115 S. Ct. 961, 964 (1995).[2] The Court reasoned that the question of private-entity status was a "prior question" that needed to be addressed even if not raised in the certiorari petition. *Id.* at 966. Similarly, whether a federal common law liability standard for directors and officers of federally chartered savings institutions even exists is a "prior question" to whether § 1821(k) supplants it. *See also Caspari v. Bohlen*, 114 S. Ct. 948, 953 (1994); *Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6 (1980).

II. FEDERAL COMMON LAW SHOULD NOT APPLY MERELY BECAUSE CITY FEDERAL WAS FEDERALLY CHARTERED

The FDIC contends that, under 12 U.S.C. § 1821(d)(2)(A)(i), it "stands in City Federal's shoes and possesses the right to assert City Federal's federal common-law claims against its former officers and directors." (FDIC Br. 28.) City Federal, however, had no such claims. Corporate negligence and breach of fiduciary duty claims are matters of state, not

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[1] As observed in petitioner's opening brief, it is not *necessary* for the Court to decide whether a federal common law liability standard exists. (Br. 14.) It may assume the existence of such a standard and then determine that § 1821(k) supplants it. However, to rule in the FDIC's favor, the Court would have to determine *both* that a federal common law liability standard exists *and* that § 1821(k) does not supplant it.

[2] The FDIC chides petitioner for having changed his position regarding the applicability of federal common law. (FDIC Br. 9-10.) It is true that, at the district court level, petitioner assumed the existence of a federal common law liability standard. That, however, was *before* the *O'Melveny* decision. After *O'Melveny*, petitioner has consistently recognized that there is no federal common law to apply. Thus, in his brief to the Third Circuit, petitioner stated: "[*O'Melveny*] sounds the death knell on the [FDIC's] effort to construct a federal common law theory to govern this case." (Br. Appellees 21.) The Petition takes the same position. (Pet. i-ii, 8-10, 16-20.) Thus, petitioner's contention is not "new." (FDIC Br. 11.)

federal, law.[3] The fact that City Federal was federally chartered does not alter this conclusion. This is especially so where, as in this case, (i) Congress has enacted a comprehensive scheme governing federally chartered savings associations but has not included a federal standard of director and officer liability; (ii) the FDIC has failed to identify any "uniquely federal interest" that would be served by the application of a uniform federal common law rule of decision, *see Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988); (iii) the FDIC has not identified any "significant conflict" between any federal interest and the application of state law liability standards for directors and officers, *see O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2055 (1994); (iv) the federal agency that has regulatory authority over federal savings associations — the Office of Thrift Supervision (OTS) — has refrained from promulgating any regulations establishing a uniform standard of liability; and (v) the agency that regulates national banks — the Office of the Comptroller of the Currency (OCC) — has expressly authorized the use of state law standards with respect to corporate governance of such banks.

The FDIC cites the Court's 1891 opinion in *Briggs v. Spaulding* for the proposition that "[w]hen Congress enacted the National Bank Act in 1864 and [the Home Owners' Loan Act] in 1933, . . . it was firmly established at general common law that those directors and officers would owe a fiduciary duty of care to the institutions, the breach of which would be redressable by the institutions." (FDIC Br. 21.) Accordingly, asserts the FDIC, "Congress not unreasonably left it to the courts, applying common law, to enforce those duties." (*Id.*) As the FDIC concedes, however, *Briggs* was decided before the Court's pronouncement in *Erie R. Co. v. Tompkins* that "[t]here is no federal general common law," 304 U.S. 64, 78 (1938). Thus, granting the existence of a *general* common law duty of care owed by directors and officers of federal savings associations prior to the enactment of the Home Owners' Loan Act of 1933 (HOLA) does not resolve the issue of whether the courts are to apply state law standards of liability or to create a uniform federal standard.

The FDIC has not identified any existing federal statute or regulation either defining the standard of liability for directors or officers of federally chartered savings associations or explicitly authorizing courts to do so. The comprehensive federal statute that governs the creation, operation and regulation of such associations, HOLA, is silent on the matter. *See* ch. 64, 48 Stat. 128 (codified as amended in scattered sections of 12 U.S.C.). The FDIC acknowledges that "Congress has not expressly defined the duties owed by officers and directors of federally chartered depository institutions." (FDIC Br. 21.) *See also Curiale v. Reissman*, 798 F. Supp. 141, 148 (S.D.N.Y. 1992) ("Although HOLA and other statutes and extensive federal regulations define many aspects of the constraints on and operation and obligations of federal savings institutions, they neither define the duties of savings bank directors nor grant federal jurisdiction over disputes involving those duties.").

When statutory authority is absent, federal courts generally may apply federal common law only when some "uniquely federal interest" is present. *Boyle*, 487 U.S. at 507. Such an interest is one "of peculiarly federal concern," *id.* at 505, in which "the interests of the United States will be directly affected," *id.* at 507. The Court found uniquely federal interests in *Boyle* because the application of state tort law in resolving death or injury claims of military personnel could directly affect the interests of the United States in its military procurement programs. *Id.* at 510-13. The Court has also found uniquely federal interests in cases involving: the rights and liabilities of the United States under nationwide programs involving the lending of federal funds by federal agencies, *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-27 (1979); the rights and obligations of the United States under contracts entered into pursuant to authority conferred by federal statute, *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 594 (1973); the civil liability of federal

[3] The standard of director and officer liability falls squarely within two traditional areas of state law: tort law, *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), and corporation law, *Burks v. Lasker*, 441 U.S. 471, 478 (1979). This Court has consistently refused to fashion a federal rule of decision regarding an issue that falls within an area traditionally governed by state law. *See United States v. Yazell*, 382 U.S. 341, 352 (1966); *United States v. Brosnan*, 363 U.S. 237, 242 (1960); *Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, 210 (1946).

officials for actions taken in the course of their duties, *Howard v. Lyons*, 360 U.S. 593, 597 (1959); and the rights and duties of the United States on commercial paper issued by it, *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943). The common ingredient in all of these cases is that an interest of the United States — generally a financial one — is directly involved and would be immediately affected by the outcome of the litigation.

There simply are no unique federal interests that justify the creation or application of federal common law liability standards for directors and officers of federally chartered savings associations. Although City Federal was federally chartered and regulated, it was a privately owned business corporation. "Where 'litigation is purely between private parties and does not touch the rights and duties of the United States,' . . . federal law does not govern." *Boyle*, 487 U.S. at 506 (quoting *Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29, 33 (1956));[4] *see also O'Melveny*, 114 S. Ct. at 2055 ("The rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred."). Had City Federal sued petitioner for breach of duty in a New Jersey court, no federal agency or official would have been a party to the suit or had any direct stake in its outcome. The FDIC has made no showing that any rights, interests or obligations of the United States would be affected in the least if state law, rather than federal common law, were applied in such cases.

It is, of course, true that the FDIC insures the deposit accounts of federally insured savings associations and that, if such an institution becomes insolvent, the interests of the FDIC are directly affected. But, under § 1821(d)(2)(A)(i), upon which the FDIC here relies, the FDIC steps into the shoes of the association and asserts any claims the association could have

[4] In *Boyle*, the Court determined that federal common law applied despite the fact that the suit involved private parties. But there, the United States had a strong interest in the potential liability of government contractors because it would affect not only the government's ability to enter into contracts but also the prices of the equipment purchased. 487 U.S. at 510-13.

asserted *when it was solvent*. With respect to *those* claims — to which the FDIC asserts federal common law should be applied — the FDIC would have had *no* direct financial interest. *See O'Melveny*, 114 S. Ct. at 2055. Nor would any other financial interests of the United States be implicated. There being no such affected interests, the predicate for the application of federal common law to such claims simply does not exist. The FDIC's reliance on *Kimbell Foods* and *Clearfield Trust* (FDIC Br. 19-20), in which the financial interests of the United States were directly involved and would have been affected by the outcome, is thus wholly misplaced.

Moreover, the FDIC acts as insurer of deposits in both federally and state chartered institutions. 12 U.S.C. §§ 1814, 1815. If the FDIC's role as insurer were a sufficient "uniquely federal interest" to require application of a federal common law standard of liability for officers and directors of federally insured institutions, such a standard would have to be applied to both state and federally chartered institutions, a result that the FDIC does not seek and that this Court rejected in *O'Melveny*. 114 S. Ct. at 2055.

Under *Boyle*, if, as in this case, a unique federal interest cannot be identified, that ends the inquiry as to whether federal common law should be applied; it may not be. Thus, plaintiff's claims arise, if at all, under state law.[5] But even where a unique federal interest is identified — and the precondition for applying federal common law has been satisfied — state law still will be displaced by a uniform federal common law rule of decision "only where . . . a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' or the application of state law would 'frustrate specific objectives' of federal legislation." *Boyle*, 487 U.S. at 507 (citations omitted); *see also O'Melveny*, 114 S. Ct. at 2055 ("Our cases

[5] If a unique federal interest does not exist, then, absent an applicable constitutional provision or federal statute or regulation, the controversy is not governed by federal law. State law applies of its own force and not simply as a "federal rule of decision." In the instant case, this distinction is significant because the FDIC has waived any state law claims it otherwise may have had.

uniformly require the existence of such a conflict as a precondition for recognition of a federal rule of decision."). The FDIC does not demonstrate that the application of state law here would create any "significant conflict" between any identifiable federal policy or interest or would frustrate specific objectives of federal legislation. No such policies, interests or objectives are mentioned.

The only conflict even suggested by the FDIC is one that allegedly might arise between state law and the standards of liability applied by the OTS, the chartering authority of federal savings associations, in administrative enforcement proceedings. (FDIC Br. 22-27.) The FDIC contends that in two such proceedings applying an ordinary care standard of liability, the OTS "spoke[] authoritatively respecting the duty of care owed by directors and officers to federal savings associations." (*Id.* at 24-25.) The FDIC's attempt to manufacture a conflict on this basis, however, is deficient for several reasons.

First, the FDIC fails to mention that both proceedings it cites involved *state*-chartered associations and, therefore, have no direct bearing on liability standards for directors and officers of federally chartered associations. The reference to an ordinary care standard in administrative enforcement actions relating to state-chartered institutions simply fails to demonstrate any federal policy or interest in having that standard, or indeed any standard, applied nationwide as federal common law in civil suits involving federally chartered institutions. The FDIC cites no authority for any such proposition.[6] Second, the decisions of the OTS in the cited proceedings were not based on a failure of the directors therein to satisfy a "simple negligence" standard.

[6] The FDIC notes that "[t]he OTS has also published substantial informal guidance respecting the duties of officers and directors," referring to four memoranda that purport to apply to all savings associations, regardless of charter. (FDIC Br. 25 n.21.) However, those memoranda were never promulgated as regulations, and they were published in 1992, 1990, 1989 and 1987, respectively. The last of the three loans that give rise to the allegations against petitioner was made in 1986. (Second Am. Compl. ¶¶ 38, 56, 72, 74.) Accordingly, the informal guidelines, even if otherwise constituting applicable law (which the FDIC nowhere establishes), can have no applicability here.

Rather, they involved conduct that failed the statutory standards established by Congress in 12 U.S.C. § 1818 (or its predecessor), which requires, at a minimum, a showing that the director or officer was "unjustly enriched" or demonstrated "a reckless disregard for law or any applicable regulation," 12 U.S.C. § 1818(b)(6)(A). Thus, the *holdings* of those decisions do not conflict with petitioner's position. Third, to the extent the agency dicta cited by the FDIC from the OTS cases espouse a standard of liability for directors or officers beyond that in 12 U.S.C. § 1818, the authority of the OTS to set such a standard in those proceedings is questionable.[7]

It is difficult to argue — and the FDIC does so only half-heartedly (*e.g.*, FDIC Br. 8, 27) — that there is a federal interest in ensuring that directors and officers of federally chartered associations are subject to a uniform standard of liability. If such an interest exists, it is difficult to understand why Congress or the OTS or its predecessor, the Federal Home Loan Bank Board (FHLBB), have never bothered to establish such a uniform standard, by law or regulation.[8] Clearly, the FHLBB had, and the OTS has, "plenary authority" over federally chartered savings associations. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982). Yet, in the 63 years since the enactment of HOLA, they never have promulgated any regulation that even purports to establish liability standards for directors and officers of such associations. In any event, the FDIC's suggestion that application of state law standards of liability, rather than a single

[7] Indeed, many states apply a gross negligence standard of liability for directors and officers rather than the "ordinary care" standard the FDIC indicates the OTS would apply. *See* Ronald W. Stevens & Bruce H. Nielson, *The Standard of Care for Directors and Officers of Federally Chartered Depository Institutions: It's Gross Negligence Regardless of Whether § 1821(k) Preempts Federal Common Law*, 13 Ann. Rev. Banking L. 169, 194-218 (1994) (identifying states that apply a gross negligence standard of liability to directors and officers).

[8] Congress obviously does not share the FDIC's concern that the standard of liability for federally chartered savings associations must be uniform and, therefore, must avoid application of state law standards of liability. As petitioner observed in his opening brief (Br. 44), in § 1821(k) Congress provided that the term "gross negligence" shall be "defined and determined under applicable state law."

federal standard of simple negligence, "would undermine the OTS's ability to implement its own coherent and uniform regulatory policy" with respect to federal savings associations (FDIC Br. 27) is not well taken.

This is true for two reasons in addition to the above. First, the OTS will retain the ability to bring enforcement actions under 12 U.S.C. § 1818(b)(6)(A) to impose remedies of the type sought in this case (*i.e.*, compensation for losses) against directors and officers of *any* savings association, regardless of its charter, based on the standard set forth in that statute. Thus, uniformity based on that standard can be achieved. More significantly, to the extent that Congress has addressed a need for uniformity in the standard of liability applied to directors and officers in cases like this seeking compensation for losses, it imposes liability *not* for simple negligence, but where the director or officer has been "unjustly enriched" or acted with "reckless disregard for law or any applicable regulation or prior order." 12 U.S.C. § 1818(b)(6)(A). Thus, not only will the OTS retain the ability to achieve uniformity, but the uniform standard Congress has enacted with respect to OTS administrative proceedings seeking compensation for losses, as here, is not the simple negligence standard the FDIC seeks to have applied in this case.

Moreover, if uniformity were an important federal interest in corporate governance matters for federally chartered depository institutions, then it is virtually incomprehensible that the OCC — the federal chartering authority for national banks — would have issued a regulation this year "that provides national banks with maximum flexibility to structure their corporate governance procedures," 61 Fed. Reg. 4849, 4854 (1996), by authorizing such banks "[t]o the extent not inconsistent with applicable Federal banking statutes or regulations, or bank safety and soundness, . . . to follow the corporate governance procedures of the law of the state in which the main office of the bank is located, the law of the state in which the holding company of the bank is incorporated, the Delaware General Corporation Law, . . . or the Model Business Corporation Act . . . ," *id.* at 4866 (to be codified at 12 C.F.R. § 7.2000(b)). The OCC obviously believes that, so long as each national bank is subject to some settled law, it is not significant that the law may

vary for institutions, and their directors and officers, from state to state, or indeed from institution to institution.

The FDIC quotes *Kimbell Foods* for the proposition that, when " 'Congress has not spoken in an area comprising issues substantially related to an established purpose of government operation . . . [then] *Clearfield* directs federal courts to fill the interstices of federal legislation.' " (FDIC Br. 21-22.) The authority to fill interstices, however, does not imply a power to add entirely new substantive provisions to a statutory scheme that Congress did not see fit to include. This is particularly true for a comprehensive statutory scheme such as HOLA. As the Court stated in *O'Melveny:* "[M]atters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." 114 S. Ct. at 2054; *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) ("[A] court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards . . . .").

Not otherwise able to meet the criteria for applying federal common law that *Boyle* and *O'Melveny* pronounce, the FDIC urges that federal common law should apply to federally chartered savings associations for no other reason than that they are federally chartered. Drawing on the Seventh Circuit's split decision in *RTC v. Chapman*, the FDIC asserts: "Just as the internal affairs of a state-chartered corporation are governed by the law of the chartering State, so federal law governs the internal affairs of federally chartered institutions." (FDIC Br. 18.)[9] While various district courts have reached that conclusion (FDIC Br. 14 n.9), and one circuit court (the Seventh Circuit) has done so, this Court has never suggested that federally chartered institutions are subject to federal common law rather than state law merely by virtue of their federal charters.

[9] The FDIC fails to mention, however, that the federal rule of decision that *Chapman* applied is the gross negligence standard of § 1821(k). *See* 29 F.3d 1120, 1123 (7th Cir. 1994). The Seventh Circuit reasoned that it was unnecessary for federal courts to "devise federal common law" liability standards because "Congress has laid down the law" in enacting the gross negligence standard in § 1821(k). *Id.*

Quite the contrary. The Court has made clear that national banks, which operate under a federal charter,[10] "are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States." *First Nat'l Bank v. Missouri*, 263 U.S. 640, 656 (1924); *see also Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248 (1944) ("[N]ational banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions.").

This is true not only for matters affecting the dealings of national banks with third parties but for matters affecting the internal affairs of such banks. Especially persuasive in this regard is the Court's decision in *Herrmann v. Edwards*, 238 U.S. 107 (1915). There the internal affairs of a national bank were unquestionably at issue, yet it was determined that there was no federal cause of action merely because the national bank had a federal charter. *Id.* at 116. *Herrmann* involved a suit by shareholders of a national bank against its directors for breach of trust in approving an improvident merger. Noting that "[t]here was no diversity of citizenship and jurisdiction over the suit therefore depended on whether there was a Federal cause of action," *id.* at 115-16, the Court stated: "[I]n the absence of a Federal controversy concerning the interpretation of some provision of the National Bank Act raising what might be considered by analogy a Federal question . . . , a mere assertion of liability on the part of directors for wrongs for which they might be responsible at common law, afford[s] no basis for jurisdiction," *id.* at 112; *see also Whittemore v. Amoskeag Nat'l Bank*, 134 U.S. 527, 530 (1890) (holding that federal courts have no jurisdiction over a suit by shareholders of a national bank against directors of the bank who allegedly breached their duties to shareholders by approving a bank loan without adequate security).

[10] In this area, the FDIC regards case authority applicable to national banks also to be applicable to federally chartered savings associations. (FDIC Br. 17-18.)

Herrmann and *Whittemore* both clearly stand for the proposition that federal law does not apply to the internal affairs of a federally chartered depository institution merely because of the source of its charter. The FDIC is thus quite mistaken when it asserts, with respect to national banks, that "this Court has never suggested that state law controls matters relating to their internal corporate governance," (FDIC Br. 18). State law governs the internal affairs of such institutions so long as it does not conflict with the laws of the United States or impose an undue burden on the performance of the institution's functions.

At the lower federal court and state court levels, a number of cases have similarly ruled that national banks are subject to state law in matters affecting their internal affairs. [11] Even more to the point, a significant number of cases — particularly those decided post-*O'Melveny* — have held that the directors and officers of federally chartered savings associations are subject to state law breach of duty claims, and have either explicitly or implicitly

[11] *See, e.g.*, *Morast v. Lance*, 807 F.2d 926, 929 (11th Cir. 1987) ("The district court did not have subject matter jurisdiction [of a suit by a bank officer against the bank for wrongful dismissal] merely because the defendant bank was a federally chartered bank."); *Maxwell v. First Nat'l Bank*, 638 F.2d 32, 34-35 (5th Cir. 1981) (characterizing shareholder suit challenging national bank consolidation as "a state law claim" and stating that "[n]ational banks are . . . subject to state law to the extent such law does not conflict with the laws of the United States"); *Austin v. Altman*, 332 F.2d 273, 276 (2d Cir. 1964) (holding that suit by national bank shareholders against directors regarding stock subscriptions is a matter of state law, not federal law); *Country Nat'l Bank v. Mayer*, 788 F. Supp. 1136, 1141-42 (E.D. Cal. 1992) ("[N]othing in the [National Bank Act] suggests a conflict with a state's demand and futility requirement in the context of a shareholder derivative suit, nor does the statute suggest that application of state law would impose an undue burden on the Bank's functions."); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Ryan*, 207 Cal. App. 2d 698, 705, 24 Cal. Rptr. 739, 743 (1962) (deciding state law breach of fiduciary duty claim brought by national bank against officer); *First Nat'l Bank v. Hall*, 143 Ga. App. 300, 301, 238 S.E.2d 284, 285 (1977) (same); *Borgsmiller v. Burroughs*, 187 Ill. App. 3d 1, 6, 542 N.E.2d 1281, 1285 (1989) (deciding state law breach of fiduciary duty claim brought by national bank shareholders against directors), *appeal denied*, 128 Ill. 2d 661, 548 N.E.2d 1066 (1990).

rejected application of the internal affairs doctrine.[12] Particularly noteworthy, in light of the FDIC's position herein, is the Eleventh Circuit's recent decision in *FDIC v. Stahl*, 89 F.3d 1510 (11th Cir. 1996). At the express urging of the FDIC, the court there applied state law as the applicable standard of liability for directors and officers of a federally chartered savings association. The court dismissed out-of-hand, as "without merit" and "not warrant[ing] discussion," the contention of the directors and officers that the internal affairs doctrine required the exclusive application of federal law. *Id.* at 1515 n.10.

In diametric opposition to its position herein, the FDIC in *Stahl* sharply criticized the Seventh Circuit's *Chapman* decision, stressing that "the panel's internal affairs doctrine analysis has

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[12] The FDIC creates a misleading impression that the "vast majority of courts" have ruled that federal law must apply to federally chartered depository institutions and that only "a small number of courts have applied state law." (FDIC Br. 14 & n.9.) Certainly, of the more recent cases, more have been decided favorably to petitioner's position than to the FDIC's. *See, e.g., FDIC v. Abel*, 92 Civ. 9175 (JFK), 1995 U.S. Dist. LEXIS 18159, at *7 (S.D.N.Y. Dec. 5, 1995) ("Plaintiff may bring state law claims against a federally chartered bank."); *RTC v. Williams*, 887 F. Supp. 1415, 1420 (D. Kan. 1995) ("There is no general federal corporation law which sets out the standard of care imposed on the officers and directors of federally-chartered financial institutions."); *RTC v. Shuck*, Civ. Act. No. 93-12057-WGY, 1995 U.S. Dist. LEXIS 4314, at *8 (D. Mass. Mar 29, 1995) ("This Court agrees with other circuits finding a distinction between state and federal financial institutions based upon the source of the charter to be without merit."); *FDIC v. Raffa*, 882 F. Supp. 1236, 1244 (D. Conn. 1995) ("[T]he mere fact that [CNB] is federally chartered does not immunize [CNB's officers and directors] from [liability under] state law."); *RTC v. Gregor*, 872 F. Supp. 1140, 1146 (E.D.N.Y. 1994) ("[P]re-FIRREA state law provided the applicable standard of liability of directors of federally-chartered savings and loans."); *RTC v. Fiala*, 870 F. Supp. 962, 969 (E.D. Mo. 1994) ("The Court finds the state/federal distinction . . . nonsensical."); *RTC v. Rahn*, 854 F. Supp. 480, 489 (W.D. Mich. 1994) (applying state statutory duty of care to directors of federally chartered savings association); *RTC v. Heiserman*, 839 F. Supp. 1457, 1462 (D. Colo. 1993) (same); *RTC v. Gibson*, 829 F. Supp. 1103, 1109 n.2 (W.D. Mo. 1993) ("There is nothing to suggest that officers and directors of federally chartered institutions are only subject to federal causes of action."); *AmeriFirst Bank v. Bomar*, 757 F. Supp. 1365, 1374 (S.D. Fla. 1991) (same as *Rahn* and *Heiserman*).

been criticized *and was in the FDIC's view erroneously applied.*"[13] The FDIC also argued, again in complete opposition to its position herein, that the "argument that only federal law governs this case . . . is wrong."[14] Given the almost exact correspondence between the facts of *Stahl* and the instant case, petitioner finds it difficult to understand how the FDIC there could have found the internal affairs doctrine wholly inapplicable while here virtually dispositive, and the argument that only federal law governs federally chartered institutions there "wrong" and here right.

The FDIC suggests in this case that the internal affairs doctrine should be applied to ensure that, where associations are engaged in multi-state lending activities, their directors and officers will not be subject to conflicting state fiduciary requirements. (FDIC Br. 15.) That potential complication is easily obviated, however, by applying the law of the state where the association has its principal place of business.[15] It is not necessary to resort to federal common law to achieve that result. Indeed, doing so creates two different standards of liability for directors and officers of financial institutions within the same state (even on the same block) depending on the source of the institution's charter. That seems neither equitable nor effective given the ease with which an institution may convert back and forth between state and federal charters. 12 U.S.C. §§ 35, 214a, 1464(i), (o).

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[13] Appellant's/Cross-Appellee's Brief at 27, *FDIC v. Stahl*, 89 F.3d 1510 (11th Cir. 1996) (emphasis added).

[14] *Id.* at 1.

[15] *See, e.g., Country Nat'l Bank v. Mayer*, 788 F. Supp. at 1141 (applying state law of national bank's principal place of business to determine demand and futility requirements); *In re Orfa Sec. Litig.*, 654 F. Supp. 1449, 1455 (D.N.J. 1987) (applying law of principal place of business rather than law of state of incorporation to govern fiduciary obligations of corporate officers); *see also* 61 Fed. Reg. 4849, 4866 (1996) (to be codified at 12 C.F.R. § 7.2000(b)) (authorizing national banks "to follow the corporate governance procedures of the law of the state in which the main office of the bank is located"); *RTC v. Everhart*, 37 F.3d 151, 154 (4th Cir. 1994) ("This case well illustrates the difficulty of determining the rule of decision if federal law, the law of the chartering jurisdiction, is applied instead of the law of the S & L's principal place of business.").

It is, moreover, difficult to take the FDIC's protestations of the need for uniformity and the exclusive application of federal law seriously when the FDIC and its predecessor, the Resolution Trust Corporation (RTC), have so routinely urged lower federal courts to apply state law against the directors and officers of federally chartered institutions.[16] If they truly believed that application of state law was inimical to the federal regulatory scheme as a policy matter, they surely would not have argued time and again — merely to gain a tactical advantage in a particular case — that state law liability standards *are* applicable.

Finally, as a policy matter, petitioner questions the wisdom of federalizing all internal corporate disputes that may arise with respect to federally chartered institutions. In the banking and thrift areas alone, there are literally thousands of such institutions. The real possibility exists, were the FDIC's federal common law position accepted, that an entire body of federal corporate common law would have to be developed in the various federal circuits and that, for federally chartered institutions, this Court would have to assume the role the Supreme Court of Delaware now assumes with respect to state-chartered corporations.

III. THE GROSS NEGLIGENCE STANDARD OF § 1821(k) DISPLACES ANY PRE-EXISTING FEDERAL COMMON LAW SIMPLE NEGLIGENCE STANDARD

Even if it were determined that City Federal could have asserted a federal common law claim for simple negligence against petitioner, the FDIC's right to assert that claim as City Federal's receiver would be supplanted by § 1821(k). Section 1821(k) authorizes the FDIC to sue, as receiver, "for gross

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[16] In addition to *Stahl*, see *RTC v. Chapman*, 29 F.3d at 1122 ("According to the RTC, it may recover from [the federally chartered savings association's] directors and officers for simple negligence under Illinois law."), *RTC v. Shuck*, 1995 U.S. Dist. LEXIS 4314, at *3 ("The RTC counters that it is entitled to recovery under . . . the state common law simple negligence standard."), and *FDIC v. Raffa*, 882 F. Supp. at 1238 ("The FDIC contends that the officers and directors of [the federally chartered savings association] are liable for simple negligence . . . in violation of applicable Connecticut law . . . .").

negligence . . . or conduct that demonstrates a greater disregard of a duty of care" than gross negligence. It does not authorize suits for simple negligence.

The FDIC contends that § 1821(k) "is not the primary source of the FDIC's authority to pursue civil actions against officers and directors" but that "[i]nstead, the FDIC's authority derives primarily from its long-standing right as receiver, now codified at 12 U.S.C. 1821(d)(2)(A)(i), to succeed to all causes of action possessed by the depository institution." (FDIC Br. 31-32.) It is true that the FDIC, as receiver, succeeds to the claims of the insolvent institution and derives its authority, in the first instance, from § 1821(d)(2)(A)(i). But it is also true that in asserting claims as a receiver, the FDIC is limited by the terms of § 1821(k). Thus, § 1821(k) expressly provides that a director or officer "may be held personally liable for monetary damages in any civil action by . . . [the FDIC] . . . (1) *acting as conservator or receiver of such institution* . . . for gross negligence . . . ." (Emphasis added.) In short, if, *arguendo*, the institution had a federal common law claim for simple negligence, and § 1821(k) did *not* exist, then under § 1821(d)(2)(A)(i), the FDIC, as receiver for the institution, would step into its shoes and could assert the same simple negligence claim against the directors and officers. But § 1821(k) does exist, and it provides that, when the FDIC asserts a claim "acting as conservator or receiver of such institution," it may sue directors and officers of a federally chartered institution "for gross negligence . . . or conduct that demonstrates a greater disregard of a duty of care . . . ." Although it may wish to, the FDIC cannot treat § 1821(d)(2)(A)(i) and § 1821(k) as if they existed independently of one another.

In a similar vein, the FDIC argues that § 1821(k) "*empowers* the FDIC, at a minimum, to sue for gross negligence, while *preserving* the FDIC's right, in addition, to assert any federal common-law claims to which it may succeed as receiver." (FDIC Br. 30 (emphasis in original).) But the undeniable fact is that § 1821(k) applies to the directors and officers of *any* "insured depository institution," including federally chartered associations like City Federal. Congress simply could not have had any rational purpose in "empower[ing]" the FDIC to bring gross

negligence claims against the directors and officers of federally chartered associations if, as the FDIC maintains, the FDIC all along had the right — standing in the shoes of insolvent institutions under § 1821(d)(2)(A)(i) — to assert simple negligence claims under federal common law. The FDIC admits as much when it states: "It is true that Section 1821(k)'s authorization of suits for gross negligence may not afford the FDIC any practical advantage insofar as federally chartered institutions are concerned, because the FDIC already has the ability to sue officers and directors of federally chartered institutions for negligence under federal common law." (FDIC Br. 35.)

The only logical way out of this conundrum, consistent with the FDIC's position, is to assume that Congress acted mindlessly when it included within the scope of § 1821(k) "insured depository institutions" — a term that includes federally chartered associations — rather than limiting § 1821(k) to state chartered institutions only. That is unlikely, however, since "insured depository institution" is an expressly defined term in FIRREA, 12 U.S.C. § 1813(c)(2), as are the terms "Federal savings association" and "State savings association," 12 U.S.C. § 1813(b)(2), (3). Absent firmer evidence to the contrary — and the FDIC offers none — it should be assumed that Congress employed the broader term "insured depository institution" because it intended § 1821(k) to apply to federally chartered institutions, as well as to state chartered institutions, in a meaningful fashion. Section 1821(k) applies meaningfully to federally chartered institutions only if it is interpreted as the Fifth, Sixth, Seventh and Tenth Circuits have done — as authorizing suits for gross negligence, not offering a meaningless option to the FDIC to sue, as it may please, for gross negligence under § 1821(k) or simple negligence under federal common law.[19]

This interpretation necessarily requires that the term "other applicable law" in the savings clause of § 1821(k) not be read to

[19] The FDIC does not even acknowledge the existence of the four circuit court decisions holding that the gross negligence standard of § 1821(k) displaces any pre-existing federal common law simple negligence standard. *RTC v. Frates*, 52 F.3d 295, 297 (10th Cir. 1995), *FDIC v. Bates*, 42 F.3d 369, 373 (6th Cir. 1994), *RTC v. Miramon*, 22 F.3d 1357, 1364 (5th Cir. 1994), and *RTC v. Gallagher*, 10 F.3d 416, 424 (7th Cir. 1993).

embrace federal common law. Otherwise, the first sentence of § 1821(k), authorizing suits for gross negligence or conduct *more* culpable than gross negligence, is effectively eviscerated insofar as federally chartered institutions are concerned. It is, of course, an " 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.' " *Department of Rev. v. ACF Indus., Inc.*, 114 S. Ct. 843, 848 (1994) (quoting *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)). Accordingly, the better reading of the savings clause is that the reference to "other applicable law" preserves applicable state law actions with lesser liability standards than gross negligence. That is precisely what the FDIC successfully argued before the Eleventh Circuit in *FDIC v. Stahl*. The court there observed:

> While § 1821(k) provides that a director may be held liable for gross negligence, the FDIC contends that Congress enacted the last sentence of the statute to permit courts to decide whether to apply state law to federally chartered financial institutions. We reach the same conclusion. That is, we find that the "saving language" in the last sentence of the statute enables claims under "other applicable law," i.e., state law for simple negligence, to survive the enactment of FIRREA.

89 F.3d 1510, 1515 (11th Cir. 1996).

The FDIC relies on the Court's opinion in *Patterson v. Shumate* for the proposition that "other applicable law" means *all* law, including federal common law. (FDIC Br. 33-34.) The Court ruled in *Patterson* that the phrase "applicable nonbankruptcy law" appearing in § 541(c)(2) of the Bankruptcy Code was not limited to state law, as petitioner contended, but encompassed "any relevant nonbankruptcy law, including federal law such as ERISA." 504 U.S. 753, 759 (1992). *Patterson* is inapplicable because there was no suggestion that interpreting "applicable nonbankruptcy law" to embrace federal law, including ERISA specifically, would render § 541(c)(2), or any other provision, of the Bankruptcy Code meaningless, in whole or in part. That is simply not the case here. If "other applicable law" in the savings clause of § 1821(k) is interpreted to include federal common law

claims for simple negligence, then the first sentence of § 1821(k) is rendered utterly meaningless insofar as federally chartered institutions are concerned.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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(7)

No. 95-928

IN THE

Supreme Court of the United States

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Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
As Receiver for CITY SAVINGS, F.S.B.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

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The Washington Legal Foundation and the Allied Educational Foundation, as amici curiae, respectfully submit this brief in support of Petitioner John W. Atherton, Jr., pursuant to Rule 37.3 of the Supreme Court Rules. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief for these amici.

INTERESTS OF THE AMICI CURIAE

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., which has supporters throughout the nation. WLF regularly appears before this Court and other federal and state courts promoting economic liberty, free enterprise principles, and the principle of limited and accountable government. WLF's Legal Studies Division also publishes monographs and other publications on these and related topics.

The issue presented in this case is of special concern to the pro-free enterprise mission of WLF. A sound free enterprise system requires well-managed financial institutions, which depends in turn on the ability to attract highly qualified persons as directors and officers of such institutions. The decision of the Third Circuit which is under review works against that objective: by creating confusion and uncertainty as to the applicable standard of care, and by attempting to impose broader liability exposure than Congress adopted or would exist under state law, the decision is almost certain to discourage service as director or officer of a federally-chartered thrift.

The court of appeals decision also offends the principle that the lawmaking powers of the federal judiciary should be circumscribed and subordinate. In effect, it substitutes the judgments of largely unaccountable federal judges — applying an undefined body of "federal common law" — in place of legislation enacted by Congress, as to the standards against which the actions of board members and management will be tested in suits arising from thrift insolvencies.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy. AEF has appeared before this Court as amicus curiae in numerous cases along with WLF.

STATEMENT OF THE CASE

Petitioner is a former director and officer of a failed thrift, City Federal Savings Bank ("City Federal"). City Federal, a federally-chartered and federally-insured institution based in New Jersey, was declared insolvent and placed in receivership on December 7, 1989 by the Office of Thrift Supervision ("OTS"). That action was taken by OTS pursuant to its powers under the Home Owners' Loan Act of 1933, as amended by Section 301 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 183 ("FIRREA").

Thereafter the Resolution Trust Corporation ("RTC" or "Receiver"), acting as receiver of a successor entity to which claims and assets of City Federal had been assigned, sued Petitioner and other former City Federal officials in the U.S. District Court for the District of New Jersey. It sought money damages on account of losses that had been incurred by City Federal in connection with defaulted real estate loans. The complaint asserted claims based on Petitioner's alleged negligence, gross negligence, and breach of fiduciary duty under "federal common law," as well as claims under New Jersey law that were later withdrawn in the district court.

The district court dismissed the complaint on November 15, 1993. (Appendix to Petition ("Pet.App.") at A57-A64). Its ruling was based on Section 212(a) of FIRREA, codified in pertinent part at 12 U.S.C. § 1821(k)(1989), which provides as follows:

> (k) LIABILITY OF DIRECTORS AND OFFICERS. — A director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by...[the RTC]...acting as conservator or receiver of such institution...for gross negligence, including any similar conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the [RTC] under other applicable law.

The district court concluded that Section 1821(k) established an exclusive, uniform federal standard of care of gross negligence for purposes of damages actions by the RTC against former directors and officers of federally chartered thrifts in receivership, and that this new statutory standard preempted any federal common law claims. (Pet. App. A63-A64).

On interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the U.S. Court of Appeals for the Third Circuit reversed the district court, in a decision authored by Circuit Judge Becker and issued June 23, 1995. *Resolution Trust Corporation v. CityFed Financial Corporation*, 57 F.3d 1231 (3d Cir. 1995) (Pet.App. A1-A37). It held that the Receiver must be permitted to proceed against City

Federal's former directors and officers on claims for negligence and breach of fiduciary duty under federal common law, and that such claims are not displaced by 12 U.S.C. § 1821(k). 57 F.3d at 1249. Amazingly, the court went on to rule that the federal gross negligence standard of Section 1821(k) is applicable only to state-chartered thrifts and does not apply at all to federally-chartered institutions — notwithstanding that they are federally-insured and within the express coverage of the statute — so the Receiver has no cause of action against former City Federal directors and officers under that statutory provision.[1] *Id.*, n.17. One member of the merits panel dissented, concluding that Section 1821(k) does apply in cases involving federally-chartered insured depository institutions, that it establishes a uniform gross negligence standard, and that it supplants federal common law. *Id.* at 1249-55 (Mansmann, J., dissenting). (Pet.App. A38-A50). Requests by Petitioner and the other defendants for rehearing and rehearing *en banc* were denied by the court of appeals on September 14, 1995. (Pet.App. A54-A56).

[1] This part of the Third Circuit decision leads to a seemingly bizarre result: in the event there is no applicable federal common law, actions against former officials of federally-chartered thrifts in receivership would have to be based on state law, which may be more lenient than the federal gross negligence standard of § 1821(k) that applies to all state-chartered institutions. Even the Respondent concedes that the court of appeals was wrong in holding that § 1821(k) applies only to state-chartered institutions, but it has not sought review of that ruling.

Petitioner filed a timely petition for certiorari.[2] This Court granted the writ on April 15, 1996 in order to review the decision of the Third Circuit. 116 S.Ct. 1415 (1996).

SUMMARY OF ARGUMENT

This case is controlled by the decision in *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994). The Third Circuit, ignoring *O'Melveny*, erroneously assumed the existence of federal common law rules of decision to govern the liabilities of directors and officers of federally-insured thrifts. The court never examined the validity of that assumption, and never identified any source of judicial authority to create such rules.

What *O'Melveny* said, and the Third Circuit should have followed, was that suits for monetary damages asserted by the receiver of a failed federally-insured association do *not* implicate such federal interests as to warrant the invention or application of federal common law. The fact that the association once held a federal charter does not appear to be a material distinction for purposes of the required analysis. Moreover, enactment of FIRREA "demolished" any argument by the FDIC to apply federal common law in this case. That is because FIRREA contains numerous provisions which create special federal rules of decision regarding claims by the receiver, including Section 1821(k) which sets out specific standards for imposing liability against former directors and officers.

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[2] Following the filing of the certiorari petition, the RTC was succeeded in its receivership capacity by the Federal Deposit Insurance Corporation ("FDIC"), which now appears as Respondent before this Court.

Since Congress has considered and adopted legislation on this matter, the courts have no authority to make different rules.

The Third Circuit improperly ignored the strong presumption that state law should be applied by federal courts whenever possible, as reflected in the Rules of Decision Act and numerous decisions of this Court. Relevant considerations for determining whether federal common law should be created in aid of a federal statute or program, as described by this Court in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), and *O'Melveny* were not taken into account by the court of appeals, which essentially performed no analysis at all.

Finally, the court of appeals was incorrect in suggesting that *Briggs v. Spaulding*, 141 U.S. 132 (1891), somehow justifies or requires that the liabilities of directors and officers of federally-chartered institutions be determined under federal common law standards. That case says nothing of the kind, and there is no need for this Court to reexamine the common law liability rules discussed in the century-old *Briggs* opinion.

ARGUMENT

The Third Circuit, in addressing the interlocutory appeal from the dismissal of the Receiver's claim, essentially framed the issue as whether the gross negligence standard of 12 U.S.C. § 1821(k) displaces or supplants federal common law standards that may impose liability against directors and officers of insolvent federally-insured depository institutions "for conduct less culpable than gross negligence (*e.g.* for ordinary negligence)." 57 F.3d at 1234 (Pet.App. A7). Formulating the case in that manner

implicitly made a significant, highly dubious assumption which appears to have misdirected the Third Circuit's inquiry. Logically, and as a matter of coherent analysis, the questions that need to be addressed are more aptly approached in a two-step sequence:

(1) Is there any federal common law that establishes a standard of care for directors and officers of insured financial institutions?

(2) If so, does such federal common law standard of care survive the enactment of Section 1821(k)?

Amici respectfully submit that the answer to the first inquiry is so plainly negative that the second question, concerning the effect of the FIRREA provision, never needs to be reached at all.[3]

I. THERE IS NO FEDERAL COMMON LAW STANDARD OF CARE FOR DIRECTORS AND OFFICERS OF FEDERALLY-INSURED AND FEDERALLY-CHARTERED THRIFTS.

The Third Circuit started its legal analysis with a prominent citation to this Court's decision in *O'Melveny & Myers v. FDIC*, 114 S.Ct. 2048 (1994). Regrettably, what should have been a starring role for *O'Melveny* proved to

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[3] The issues of whether and to what extent § 1821(k) preempts state law and creates the exclusive standard of care for federally-insured thrift directors and officers in receivership suits are not presented in this case, as the Receiver abandoned its state law claims before the district court.

be only a brief cameo appearance. Either the appellate panel never actually read that key decision, decided to ignore it, or simply failed to grasp *O'Melveny's* clear and controlling import — "***There is no federal general common law***," and no basis for creating special federal judge-made rules of decision simply to enhance recoveries in failed thrift receivership litigation. *Id.* at 2053, quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added).[4] The court of appeals got off on the wrong foot by trying to ascertain whether FIRREA displaced or supplanted federal common law, *see* 57 F.3d at 1244-49 (Pet.App. A27-A36), rather than determining whether there ever was any basis for creating federal common law in the first place.

a. The Decision of the Court of Appeals Violates the Unmistakable Teaching of *O'Melveny*.

The Third Circuit did not attempt to distinguish *O'Melveny & Myers v. FDIC* from this case, and there does not appear to be any material distinction that would produce a different outcome. By unaccountably ignoring that decision, the Third Circuit failed to apply the law as clearly announced by the Supreme Court just one year earlier.

As here, the FDIC, appearing in *O'Melveny* as receiver of an insolvent state-chartered savings and loan association, asserted the applicability of federal common law in suits to

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[4] *Accord, Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349 (3d Cir. 1987) (acknowledging in civil RICO case that "there is no federal general common law," citing *Erie*)(Becker, J.).

recover losses suffered by the thrift in connection with real estate transactions. One target of that litigation was a deep-pockets law firm that the FDIC alleged was negligent and breached its fiduciary duty in performing services for the association. Although its cause of action arose under state law, the FDIC argued that certain knowledge-imputation defenses raised by the law firm had to be determined under federal common law. With respect to claims of the savings and loan against the defendant firm, the FDIC argument was swiftly rejected by this Court as "so plainly wrong" that it needed little discussion beyond quoting *Erie*. 114 S. Ct. at 2052.

The Receiver's position in this case is materially the same, and equally wrong. The Receiver claims only to stand in the shoes of City Federal with respect to the institution's "preexisting" common law cause of action against Petitioner — and not to assert any special or unique powers that, upon its appointment as Receiver, automatically converted its suit to a federal statutory cause of action — but it argues that the source of that cause of action must be ***federal*** law simply because City Federal operated under a charter issued by the federal government. (*See* Brief for the Respondent in Opposition, pp. I, 8-9). Amici believe that argument is foreclosed by the *O'Melveny* decision. The Receiver is on no sounder footing in invoking federal rules of decision here, by virtue of the closed institution's federal charter, than where it sought help from federal common law in asserting state law claims of an insolvent state-chartered, federally-insured institution.

O'Melveny further considered whether the FDIC's status as a receiver under pre-FIRREA federal statutory authority somehow authorized the creation of special

federal rules of decision in the actions it brought. The Court, holding that this was ***not*** one of those "few and restricted" cases where "judicial creation of a special federal rule would be justified," rejected the argument that state law should be displaced because of the receivership. *Id.* at 2055. As the opinion explained:

> What is fatal to Respondent's position in the present case is that it has identified *no* significant conflict with an identifiable federal policy or interest. There is not even at stake that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity. The rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred.

Id. at 2055. Likewise the FDIC's obvious interest in more favorable rules of decision in order to enhance its prospects of winning in receivership litigation was rejected as insufficient. *Id.*

Even more significant in *O'Melveny* is this Court's assessment of the effect of FIRREA, which was enacted after commencement of that receivership. The FDIC argued there that the new statute justified creation of federal common law, "as a *nonexclusive* grant of rights to the FDIC receiver, which can be supplemented or modified by federal common law; and that FIRREA as a whole, by demonstrating the high federal interest in this area, confirms the courts' authority to promulgate such common law." *Id.* at 2054. But, the Court held, "This argument is

demolished by those provisions of FIRREA [including Section 1821(k)] which specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver." *Id.* The undeniable message for the present case is that Section 1821(k), expressly authorizing claims against directors and officers for gross negligence, excludes any possibility that the FDIC may pursue claims against such parties under some other federal common law standard of care.

b. The Assumption That Federal Common Law Exists and Applies In This Case Is Contrary to the Rules of Decision Act and Decisions of This Court.

The Rules of Decision Act, codified at 28 U.S.C. § 1652 and based on Section 34 of the Judiciary Act of 1789, 1 Stat. 92, states that:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

The statute creates a presumption that state law — not federal common law — is to be applied by federal courts in ***all*** civil litigation (not just diversity cases) except to the extent that a federal statute, treaty or Constitutional provision authorizes or requires a different rule of decision. The question thus is whether a federal statute such as FIRREA mandates or authorizes judicial creation of additional or interstitial federal common law rules to be applied in D&O litigation involving failed thrifts. If not,

negligence standard of Section 1821(k) or the standards of care established under state common law, to the extent not preempted — and the matter of *which* of those applies is not presented here.

This Court has identified the considerations relevant to determining whether federal common law should be created in aid of a federal statute or program, or whether state law should be utilized.[5] These include: (1) the need for nationwide uniformity in a federal program; (2) whether specific objectives of the federal program would be frustrated by application of state law; and (3) the potential disruption of commercial relations predicated on state law if different federal rules are created. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29 (1979). Furthermore, a court-made federal rule should not be adopted "to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *O'Melveny*, 114 S. Ct. at 2054.

Unfortunately, the Third Circuit neglected even to consider these factors, much less weigh them, in its blithe assumption that federal common law would supply the rule of decision for the Receiver's action against Petitioner. Nothing in this case supports a compelling need to apply uniform federal common law standards in damages actions against former officials of insolvent federally-insured thrifts

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[5] Even where interstitial rules must be developed by the courts as part of a federal statutory scheme, which comprise a form of federal common law, there is a presumption in favor of adopting state law for that purpose. *See, e.g.*, *Wilson v. Garcia*, 471 U.S. 261 (1985).

against former officials of insolvent federally-insured thrifts — some of which are chartered by the states and some of which have federal charters. Further, as indicated in *O'Melveny*, the comprehensive scope of FIRREA and its inclusion of a gross negligence standard in Section 1821(k) militates strongly against creation or enforcement of federal judge-made standards of conduct in this field.

c. This Court's Decision In *Briggs v. Spaulding* a Century Ago Is Not Precedent For Imposing Federal Common Law Standards of Care.

The suggestion by the Third Circuit in footnote 16 of its opinion, 57 F.3d at 1247 (Pet.App. A32-A33), that a federal common law standard of care for directors and officers of federally-chartered depository institutions has existed since *Briggs v. Spaulding*, 141 U.S. 132 (1891), is incorrect and misleading. Although *Briggs* involved the receivership of a national bank, nothing in that decision indicated that the applicable standard was a matter of *federal* common law, as distinct from general law or state law. And the more recent, post-*Erie* Supreme Court decision in *Wichita Royalty Co. v. City National Bank*, 306 U.S. 103, 107 (1939), holds that, in litigation involving claims by or against an insolvent national bank, a federal court is obligated to follow the applicable rulings of state courts and is not free to make up a federal rule of decision.

Moreover, since federal judges are not generally authorized to establish the rules of decision for such cases, there is no occasion for this Court to accept the court of appeals' invitation in note 16 "to reexamine and/or refine the *Briggs* articulation of the common law standard of liability for directors and officers of [federally-chartered] institutions." This gratuitous suggestion illustrates the

federal court discretion to change the rules by which business is conducted, whenever deemed appropriate and despite the recent enactment of comprehensive legislation covering the same matters. It is another demonstration of "the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy." *O'Melveny & Myers v. FDIC*, 114 S. Ct. at 2055. If anyone is to undertake such a redefinition, involving far-reaching policy questions, it should be Congress rather than the federal judiciary. *Id.*, 76-77; *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 646-47 (1981).

CONCLUSION

The decision of the Third Circuit should be reversed, and this Court should clarify that directors and officers of federally-insured depository institutions are not subject to claims based on "federal common law" standards of conduct.

Respectfully submitted,

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Date: June 27, 1996

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No. 95-928

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JOHN W. ATHERTON, JR.,

Appellant,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its capacity as
receiver for CITY SAVINGS, F.S.B,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE JOSEPH IARIA, DORIS HALL, WILLIAM HADLEY, ROGER LANE, RAYMOND TAYLOR, JACQUELINE PAPPAS, IRENE KRAMER, LEONARD LOMELL, RICHARD SUTTON, DAVID JOHNSON, RICHARD SAMBOL, JACK MEYER, JOHN FELLOWS AND WILLIAM HIERING ADVOCATING REVERSAL OF THE OPINION BELOW

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INTEREST OF AMICI CURIAE

Prior to the passage of the Financial Institution Reform and Recovery Act of 1989 ("FIRREA"), the First

National Bank of Toms River (the "Bank" or "FNBTR") adopted an insulating provision in its articles of association that gives amici curiae a unique interest in this appeal from the Third Circuit's decision in Resolution Trust Corp. v. Cityfed Financial Corp., 57 F.3d 1231 (3d Cir. 1995) ("Cityfed"). Amici curiae are former directors and officers of the FNBTR who are defendants in a suit captioned Federal Deposit Insurance Corporation v. Iaria, et al., civil action number 94-2455 (MLP), pending in the United States District Court of the District of New Jersey. The Federal Deposit Insurance Corporation ("FDIC"), in its capacity as the FNBTR's receiver, has sued the Bank's directors and officers claiming that amici curiae approved certain loans in a manner that was negligent and/or grossly negligent. In response to the action commenced against them by the FDIC, amici curiae have asserted as a defense that the FDIC's claims fail due to the insulating provision in the FNBTR's articles of association which protects them against claims of negligence, gross negligence and breach of fiduciary duty. Amici curiae presently have a dispositive motion pending before the District of New Jersey on these grounds.

The Third Circuit based its interpretation of FIRREA on the assumption that only state banks insulated their directors pursuant to state law. The Third Circuit reasoned because § 1821(k) of FIRREA was meant to curtail the protections afforded by state insulating statutes, it follows that Congress did not intend this section of FIRREA to apply to federal banks. Applying this reasoning to the FNBTR leads to a questionable result -- a literal application of the Court's holding would mean that § 1821(k) had no effect on the insulating provisions adopted by the FNBTR.

SUMMARY OF ARGUMENT

Amici curiae advocate the reversal of the opinion rendered by the United States Court of Appeals for the Third Circuit in Resolution Trust Corp. v. Cityfed Financial Corp., 57 F.3d 1231 (3d Cir. 1995), because its reasoning cannot be reconciled with the fact that federally-chartered institutions adopted provisions insulating their directors and officers against claims of negligence, gross negligence and breach of the fiduciary duty of due care. Amici curiae believe that the Third Circuit erred in holding that federal common-law governs the liability of the directors and officers of federally-chartered banks. Contrary to the Third Circuit's opinion, a single body of law controls the tort liability of both state- and federally-chartered banks -- the law of the state where the conduct at issue occurred. State tort law controls except insofar as Congress has pre-empted state law or the Bank itself has agreed not to assert certain claims against its directors and officers.

Amici curiae submit this brief to place before the Court an issue not apparent in the record below and which the Third Circuit failed to consider -- that prior to the passage of FIRREA federally-chartered institutions adopted provisions in their articles of association equivalent to a state insulating statute. The FNBTR's insulating provision bars claims by the Bank against its officers and directors for alleged negligence, gross negligence and breach of fiduciary duty. The Third Circuit failed to consider this possibility when it reasoned that § 1821(k) applies only to state banks because Congress adopted § 1821(k) solely to pre-empt insulating statutes adopted by state legislatures with respect to state-chartered institutions. When one considers that federal banks achieved the same protection by amending their articles of association, the Third Circuit's opinion leads to the questionable result that Congress intended to pre-empt the insulation of directors and officers of state banks but not of federal banks. A more

consistent approach would apply § 1821(k) to both state and federal banks, with the understanding that the tort liability of each is controlled by state law. This has the added benefit of being consistent with O'Melveny & Myers v. FDIC, 512 U.S. ___, 129 L.Ed.2d 67, 114 S.Ct. 2048 (1994).

ARGUMENT

I. THE THIRD CIRCUIT ERRED IN RECOGNIZING THE EXISTENCE OF A FEDERAL COMMON-LAW CAUSE OF ACTION.

The Third Circuit's opinion rests on the fallacious assumption that there is a "federal common law" governing the liability of directors and officers of federally-chartered banks. To the contrary, "[t]here is no federal general common law," Erie R. Co. v. Tomkins, 304 U.S. 64, 78, 82 L.Ed. 1188, 58 S.Ct. 817 (1938), and there is no basis for the Third Circuit's creation of federal common-law causes of action against the directors and officers of federally-chartered banks. In O'Melveny, another suit brought by the FDIC as receiver of a failed bank, this Court rejected the FDIC's attempt to supplant state law with respect to the imputation of corporate officers' knowledge to the corporation. The Court concluded that the Financial Institution Reform and Recovery Act ("FIRREA") places "the FDIC in the shoes of the insolvent [bank], to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise." 129 L.Ed.2d at 75. Accordingly, state law governs the liabilities of directors and officers of both state-chartered and federally-chartered banks, except insofar as the bank has insulated the directors and officers from liability or Congress has pre-empted either state law or that insulation.

II. THE THIRD CIRCUIT ALSO ERRED WHEN IT RULED THAT § 1821(k) DOES NOT APPLY TO OFFICERS AND DIRECTORS OF FEDERALLY-CHARTERED BANKS.

The Third Circuit also erred when it held that "§ 1821(k) was simply not enacted to define the standard of care applicable to federally chartered institutions governed by federal common law." 57 F.3d at 1246. To the contrary, amici curiae contend that Congress intended § 1821(k) to define the minimum standard of care applicable to all banks irrespective of their charter as of the date of its adoption.[1] The Third Circuit in part avoided this result by holding that § 1821(k) has no application to federally-chartered banks. That reasoning, however, wrongly assumes that federally-chartered banks did not adopt provisions into their articles of association.

1 The Third Circuit further held that § 1821(k) did not pre-empt any claims against directors and officers based on claims arising from conduct less culpable than gross negligence (i.e., claims for simple negligence and breach of fiduciary duty). 57 F.3d at 1246. This result conflicts with the holdings of the Fifth, Sixth, Seventh and Tenth Circuits. See RTC v. Miramon, 22 F.3d 1357 (5th Cir. 1994); RTC v. Bates, 42 F.3d 369 (6th Cir. 1994); RTC v. Gallagher, 10 F.3d 416 (7th Cir. 1993); RTC v. Frates, 52 F.3d 295 (10th Cir. 1995). However, this ruling should not affect insulated directors and officers, who are absolved of liability for negligence and breach of fiduciary duty by virtue of their insulation.

A. Consistent with the OCC's Interpretative Letters, Federally-Charted Banks Adopted Insulating Provisions in their Articles of Association.

Prior to the passage of FIRREA, federal banks were permitted to adopt insulating provisions into their articles of association. Pursuant to the National Bank Act, a federally-chartered bank may adopt any provision that is "not inconsistent with law, [and] which the Association may see fit to adopt for the regulation of its business and the conduct of its affairs." 12 U.S.C. § 21. Thus, a national bank may adopt any protections available under state law unless it "infringe[s] [upon] the National Banking Laws or impose[s] an undue burden on the performance of the bank's functions." Anderson National Bank v. Luckett, 321 U.S. 233, 248, 88 L.Ed.2d 692, 64 S.Ct. 599 (1944). The FNBTR, the bank for which amici curiae served as directors and officers, adopted the following provisions in their articles of association insulating them from liability for claims of negligence, gross negligence and breach of fiduciary duty:

> A director shall not be personally liable to [the FNBTR] or its shareholders for damages for breach of any duty owed to [the FNBTR] or its shareholders, except for liability for any breach of duty based upon an act or omission (i) in breach of such person's duty of loyalty to [the FNBTR] or its shareholders, (ii) not in good faith or involving a knowing violation or law or (iii) resulting in receipt by such person of an improper personal benefit.

Articles of Association of the First National Bank of Toms River, Article Tenth (eff. June 24, 1987). This provision was

based upon similar protection afforded by New Jersey and many other states. See, e.g., N.J.S.A. 17:9A-3; N.Y. Bus. Corp. §402(b); Del. Code Ann. §102(b)(7); Fla. Stat. Ann. §607.0830.

At the time such provisions were adopted, national banks asked the Office of the Comptroller of the Currency ("OCC") for its position with respect to these insulating provisions, and after consideration the OCC declined to object to them. See OCC Interpretative Letter No. 483 (May 24, 1989) (reprinted in Fed. Banking L.Rp. (CCH), ¶83,048) (the OCC "does not object" to inclusion of such protections in a bank's Articles of Association); OCC Interpretative Letter No. 456 (May 6, 1988) (reprinted in Fed. Banking L.Rp. (CCH), ¶85,680) (the OCC "has no formal policy with respect to the adoption of [state law] standards by national banks" and it will amend its interpretative rulings on indemnification "to prohibit [the] adoption of such standards" if it determines that they are inconsistent with federal law). In addition, the OCC has expressly authorized national banks to indemnify directors and officers for simple negligence and for payment of director and officer liability insurance premiums. See 12 C.F.R. 7.5217(a), (d). The express authorization to indemnify for negligence is the substantive equivalent of agreeing not to sue directors and officers for simple negligence. Accordingly, the FNBTR and many other national banks validly adopted insulating provisions into the articles of association.

B. The Third Circuit Erred by Limiting § 1821(k) to State-Chartered Banks.

The Third Circuit reasoned that Congress enacted § 1821(k) "for the [sole] purpose of pre-empting state insulating statutes." 57 F.3d at 1246. The Third Circuit did not comprehend the fact that national banks can and did achieve

the same result through the adoption of insulating provisions into their articles of association.

This error must be reversed. The liabilities of directors and officers of both national and state banks are governed by state law, except to the extent that the bank insulates its directors and officers or Congress pre-empts state law or the insulation. In § 1821(k), Congress pre-empted the insulation of both state and federal bank directors and officers for claims accruing as of the date of the statute's enactment. To hold otherwise leads to the questionable conclusion that Congress deliberately distinguished between state- and federally-chartered bank directors and officers, pre-empting the insulation of one category but not of the other. Accordingly, directors and officers such as amici curiae who received the benefit of insulation (whether through state law or the bank's articles of association) may not be sued for claims accruing prior to § 1821(k)'s enactment for insulated conduct. Moreover, those insulated directors and officers cannot be sued for claims accruing after the enactment of § 1821(k) for culpability less than the gross negligence standard prescribed in that statute because they remain insulated from those claims.

CONCLUSION

For the reasons set forth above, the Third Circuit's opinion in Cityfed should be reversed.

Respectfully submitted,

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Dated: June 27, 1996

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NATIONAL BANKS

[¶85,680] Amending National Bank Articles of Association to Limit Liability of Its Directors under State Law.

Daniel N. Goldstein, Attorney, Securities & Corporate Practices Division. Interpretive Letter No. 456, May 6, 1988. Interpreting 12 USC 73 (¶ 62,010), 12 USC 93(a) (¶ 11,403).

This will acknowledge receipt of your April 11, 1988 letter and will confirm our April 6, 1988 telephone conversation concerning the Bank's proposal to amend its Articles of Association to limit the liability of its directors. You represented that the Maryland General Assembly recently enacted a statute which permits state chartered banks and corporations to limit the personal liability of their directors. You requested advice on whether the Bank may amend its Articles to take advantage of the standards set forth in the new law.

In our telephone conversation, I advised that the OCC is currently assessing whether laws such as the new Maryland law is consistent with the national banking laws, and, in particular, with 12 U.S.C. §§73, 93(a) and 1818. At this time, however, the OCC has no formal policy with respect to the adoption of these standards by national banks. Accordingly, the Bank and Bank counsel should make a determination as to whether this standard is appropriate and consistent with the national banking laws. By not objecting at this time to the Bank's adoption of these provisions, the OCC in no way waives its right to bring an action under U.S.C. §§93(a) or 1818 for conduct which involves a breach of a Bank director's common law duty of care. You should note that bank directors may have an even higher standard of care than other corporate directors.

If the Bank chooses to ask shareholders to vote on the adoption of these amendments, it must make full and accurate disclosure of all material facts. At a minimum, the Bank should provide to its shareholders the following disclosure concerning the proposed adoption of the standards limiting director liability set forth in the new Maryland statute:

(1) The OCC currently is assessing whether laws such as the new Maryland statute, including certain provisions contained therein, is consistent with the national banking laws, including, *inter alia*, 12 U.S.C. §§73, 93(a) and 1818.

(2) In the event the new law is deemed inconsistent with the national banking laws, the OCC may:

(a) amend the interpretive ruling on indemnification (12 C.F.R. §7.5217) to prohibit adoption of such standards; and/or

(b) require national banks which have altered their Articles of Association in accordance with the new state law to suspend any contemplated action under their present Article and to adopt an Article consistent with the national banking laws;

(3) An explanation of the reasons for the Bank's adoption of the standard limiting liability; and

(4) A discussion of any difficulty which the Bank has had in obtaining director and officer liability insurance and the reasons for the difficulty.

Please note further that any amendment to the Bank's Articles of Association which alters the Bank's indemnification standard must contain the limitations set forth in 12 C.F.R. §7.5217.

I trust this is responsive to your request. If you have any questions, please do not hesitate to contact Sue E. Auerbach, Attorney, Securities & Corporate Practices Division, at (202) 447-1954.

CONTROL

[¶85,681] Outstanding Common Stock Acquisition Through Foreclosure and the Prior Notice Requirement of the Change in Bank Control Act.

Donald N. Lamson, Assistant Director, Securities & Corporate Practices Division. Interpretive Letter No. 457, August 8, 1988. Interpreting 12 USC 1817(j) (¶ 47,269); 12 CFR 5.50 (¶ 60,514).

This is in response to your letter of May 25, 1988, in which you provided your opinion that an acquisition of 87% of the Bank's outstanding common stock through foreclosure of a promissory note would not trigger the prior notice requirements of the Change in Bank Control Act of 1978 ("Act"), 12 U.S.C. §1817(j). You stated that a violation of the Act would not arise because any acquisition of control would result from foreclosure of a debt previously contracted in good faith which, by regulation, is exempt from the Act's prior notice requirements. *See* 12

DIRECTOR LIABILITY

[¶ 83,048] Personal Liability for Monetary Damages for Breach of Duty as a Bank Director.

Ellen Broadman, Assistant Director, Securities and Corporate Practices Division. Interpretive Letter No. 483, May 24, 1989. Interpreting 12 USC 73 (¶ 62,010), 12 USC 93 (¶ 11,403), 12 USC 1818 (¶ 47,271), 12 CFR 7.5217 (¶ 60,884).

This relates to your letter of February 25, 1989, asking that the Comptroller review a copy of a resolution the Bank's Board of Directors intends to adopt at the next annual meeting in May.

The proposed resolution provides that a director of the Bank shall not be personally liable to the Bank, its shareholders or the Comptroller of the Currency for monetary damages for breach of duty as a director except for the following:

(a) transactions in which the director's personal financial interest is in conflict with the financial interest of the Bank or its shareholders;

(b) acts or omissions which are not in good faith, which involve intentional misconduct or which are known to the director to be violations of law; or

(c) transactions described in KRS 271B.8-330 (liability for unlawful distributions to shareholders), or for any transaction from which the director derived an improper personal benefit.

As a general matter, the OCC does not review proposed amendments to a bank's Articles of Association. The Comptroller currently is considering whether certain types of director liability provisions are consistent with the national banking laws, including, *inter alia*, 12 U.S.C. §§ 73, 93(a) and 1818. At this time, the Comptroller does not object to the adoption in a bank's Articles of Association of director liability provisions which substantially reflect the law of the state where the bank is located, provided these Articles do not contravene the limitations contained in 12 C.F.R. § 7.5217 or interfere with the Comptroller's exercise of its supervisory responsibilities. In this regard, we believe that the proposed resolution is impermissible to the extent that it directly limits the personal liability of directors of the Bank in actions brought by the Comptroller of the Currency.

Under 12 C.F.R. § 7.5217(b), a director may not be indemnified against expenses, penalties, or other payments incurred in an administrative proceeding or action instituted by the Comptroller which results in a final order assessing civil money penalties or requiring affirmative action by an individual or individuals in the form of payments to the bank. Under 12 C.F.R. § 7.5217(c), the Comptroller may review the threat to bank safety and soundness posed by indemnification standards and direct modification of a specific indemnification through appropriate administrative action. Under 12 C.F.R. § 7.5217(d), Articles providing for the payment of premiums for insurance covering the liability of directors shall explicitly exclude insurance coverage for a formal order assessing civil money penalties against a director. Although these regulations cover indemnification and insurance provisions and do not address direct provisions limiting the liability of directors, any Article, such as the proposed one, which has the effect of limiting the Comptroller's ability to either pursue civil money penalties, require a director to make affirmative payments to the bank, or bring an action under 12 U.S.C. §§ 93(a) or 1818 for conduct which involves a breach of the director's common law duty of care, would appear to be inconsistent with the limitations of 12 C.F.R. § 7.5217 and to interfere with the Comptroller's exercise of its supervisory responsibilities. You should note that bank directors may have an even higher standard of care than other corporate directors.

With the exceptions noted above, the OCC takes no position on the adoption of the proposed resolution provided the Bank makes full and accurate disclosure to its shareholders of all material facts. By taking no position at this time on the Bank's adoption of parts of the proposed resolution, the OCC in no way waives its right to bring appropriate actions based on Bank director's breach of duties as director.

Any change in the Bank's liability standards must be effected through an amendment to the Bank's Articles of Association. At a minimum, the Bank should provide to its shareholders the following disclosures if it seeks a vote on the portions of the proposed resolutions on which the OCC has taken no position:

(1) The OCC is currently assessing whether certain types of director liability provisions are consistent with the national banking laws, including, *inter alia*, 12 U.S.C. §§ 73, 93(a) and 1818;

(2) In the event that director liability standards, or portions thereof, are deemed inconsistent with national banking laws, the Comptroller may:

(a) amend 12 C.F.R. § 7.5217 to prohibit adoption of such provisions; and/or

(b) require a bank which has altered its Articles of Association in accordance with state law to suspend any contemplated action under its present Article and to adopt an Article consistent with the national banking laws;

(3) An explanation of the reasons for the Bank's adoption of the standard limiting director liability; and

(4) A discussion of any difficulties which the Bank has had in obtaining director and officer liability insurance and the reasons for the difficulty.

OFFICER INDEMNIFICATION

[¶ 83,049] Indemnification of Officers for Judgments, Fines, Settlements, and Expenses.

Elizabeth S. Malone, Attorney, Securities and Corporate Practices Division. Interpretive Letter No. 484, June 20, 1989. Interpreting 12 CFR 7.5217 (¶ 60,884).

This is in response to your letter of April 11, 1989 in which you requested information concerning the OCC's interpretation of 12 C.F.R. § 7.5217.

In that letter you stated that your client is an officer of a national bank, but not a director, and that he also is not an officer or director of the bank holding company which owns 100 percent of the outstanding equity securities of the bank. The holding company is incorporated under Delaware law. In 1988, the bank amended its Articles of Association to provide for indemnification along the lines authorized by Section 145 of the Delaware General Corporation law.

You further stated that the Articles provide that the bank shall indemnify its directors in third party actions if they acted in good faith and in a manner reasonably believed to be in or not opposed to the best interests of the bank; and in actions by or in the right of the bank in the same manner, except that no indemnification may be made of any claim as to which the person has been adjudged to be liable to the bank unless a court determines that such person is fairly entitled to indemnity. The indemnification as to third party actions covers expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred; the indemnification as to actions by or in the right of the bank run only to expenses (including attorneys' fees). The Articles also authorize but do not require indemnification of officers, employees or agents of the bank in the same manner and to the same extent provided above as to directors; any indemnification is effective only as authorized in the specific case upon a determination that indemnification is proper under the circumstances, with such determination to be made by a majority vote of a quorum of directors of the bank not parties to the action, or by independent legal counsel or the stockholders of the bank.

You questioned whether 12 C.F.R. § 7.5217 authorizes or allows a national bank to adopt and act in accordance with articles which allow indemnification of officers (except in actions brought by or on behalf of the bank) with regard to judgments, fines and settlements, as well as expenses, as long as the provisions substantially reflect general standards of law as evidenced by the law of the state in which the bank is headquartered or the law of the state in which its holding company is incorporated. The OCC interprets § 7.5217 as permitting such payments.

12 C.F.R. § 7.5217(a) states that:

> A national bank may provide in its articles of association for the indemnification of directors, officers, and employees for *expenses* reasonably incurred in actions to which the directors, officers, or employees are parties or potential parties by reason of the performance of their official duties. Indemnification articles which substantially reflect general standards of law as evidenced by the law of the state in which the bank is headquartered, the law of the state in which the bank's holding company is incorporated, or the relevant provisions of the Model Business Corporation Act ("MBCA") are presumed by the Office of the Comptroller of the Currency to be within the corporate powers of a national bank. (emphasis added)

Section 7.5217 does not define the term "expenses." Nevertheless, one can determine whether judgments, fines, and settlements were intended to be covered by examining the MBCA.

Section 7.5217 was revised in 1984 "to recognize that a national bank, with certain limitations may adopt indemnification standards which reflect either general corporate law standards, as evidenced by the law of the state in which it is headquartered, or the standards suggested in section 5 of the MBCA as drafted by the American Bar Association." 49 Fed. Reg.

ARTICLES OF ASSOCIATION

OF

THE FIRST NATIONAL BANK OF TOMS RIVER, N.J.

For the purpose of organizing an Association to carry on the business of banking under the laws of the United States, the undersigned do enter into the following Articles of Association:

FIRST. The title of this Association shall be "The First National Bank of Toms River, N.J."

SECOND. The Main Office of the Association will be 40 Main Street, Toms River, New Jersey 08753, County of Ocean, State of New Jersey. The general business of the Association shall be conducted at its main office and its branches.

THIRD. The Board of Directors of this Association shall consist of not less than five nor more than twenty-five shareholders, the exact number to be fixed and determined from time to time by resolution of a majority of the full Board of Directors or by resolution of the shareholders at any annual or special meeting thereof. Each director shall own $1,000 equity interest in this national bank or in a company which has control of the bank. Amount of the specified interest conforms to the requirement of 12 U.S.C. 72 as amended March 31, 1980. Any vacancy in the Board of Directors may be filled by action of the Board of Directors.

FOURTH. There shall be an annual meeting of the shareholders, the purpose of which shall be the election of Directors and the transaction of whatever other business may be brought before said meeting. It shall be held at the main office or other convenient place as the Board of Directors may designate, on the day of each year specified therefore in the By-Laws, but if no election is held on that day, it may be held on any subsequent day according to such lawful rules as may be prescribed by the Board of Directors.

Nominations for election to the Board of Directors may be made by the Board of Directors or by any stockholder of any outstanding class of capital stock of the Bank entitled to vote for election of directors. Written notice of said nominations shall be given to the Association's parent bank holding company at least 30 days prior to the date set for the annual meeting of the shareholder for the election of Directors.

FIFTH. The authorized amount of capital stock of this Association shall be 24,000,000 shares of common stock of the par value of TWO DOLLARS AND FIFTY CENTS ($2.50) each; but said capital stock may be increased or decreased from time to time, in accordance with the provisions of the laws of the United States.

If the capital stock is increased by the sale of additional shares thereof, each shareholder shall be entitled to subscribe for such additional shares in proportion to the number of shares of capital stock owned by him/her at the time the increase is authorized by the shareholders, unless another time subsequent to the date of the shareholders' meeting is specified in a resolution by the shareholders at the time the increase is authorized. The board of directors shall have the power to prescribe a reasonable period of time within the preemptive rights to subscribe to the new shares of capital stock must be exercised.

The Association, at any time and from time to time, may authorize and issue debt obligations, whether or not Subordinated, without the approval of the shareholders.

SIXTH. The Board of Directors shall appoint one of its members President of this Association, who shall be Chairperson of the Board, unless the Board appoints another director to be Chairperson. The Board of Directors shall have the power to appoint one or more Vice Presidents; and to appoint a Cashier and such other officers and employees as may be required to transact the business of this Association.

The Board of Directors shall have the power to define the duties of the officers and employees of the Association; to fix the salaries to be paid to them; to dismiss them; to require bonds from them and to fix the penalty thereof; to regulate the manner in which any increase of the capital of the Association shall be made; to manage and administer the business and affairs of the Association; to make all By-Laws that it may be lawful for them to make; and generally to do and perform all acts that it may be legal for a Board of Directors to do and perform.

SEVENTH. The Board of Directors shall have the power to change the location of the main office to any other place within the limits of Toms River, Dover Township, Ocean County, New Jersey, without the approval of the shareholders but subject to the approval of the Comptroller of the Currency; and shall have the power to establish or change the location of any branch or branches of the Association to any other location, without the approval of the shareholders but subject to the approval of the Comptroller of the Currency.

EIGHTH. The corporate existence of this Association shall continue until terminated in accordance with the laws of the United States.

NINTH. The Board of Directors of this Association, one or more shareholders owning, in the aggregate, not less than ten percent of the stock of this Association, may call a special meeting of sharesholders at any time. Unless otherwise provided by the laws of the United States, a notice of the time, place, and purpose of every annual and special meeting of the shareholders shall be given by first-class mail, postage prepaid, mailed at least one day prior to the date of such meeting to each shareholder of record at his/her address as shown upon the books of this Association.

TENTH. (1) As used in this Article

(a) "corporate agent" means any person who is or was a director, officer, employee or agent of this Association and any person who is or was a director, officer, trustee, employee or agent of any other enterprise, serving as such at the request of this Association, or the legal representative of any such director, officer, trustee, employee or agent;

(b) "other enterprise" means any domestic or foreign corporation, other than this Association, and any national banking association, partnership, joint venture, sole proprietorship, employee benefit plan, trust or other enterprise, whether or not for profit, served by the corporate agent;

(c) "expenses" means reasonable costs, disbursements and counsel fees;

(d) "liabilities" means amounts paid or incurred in satisfaction of settlements, judgments, fines and penalties;

(e) "proceeding" means any pending, threatened or completed civil, criminal, administrative or arbitrative action, suit or proceeding, and any appeal therein and any inquiry or investigation which could lead to such action, suit or proceeding;

(f) "paragraph" means the paragraphs of this Article.

2(a) A director shall not be personally liable to this Association or its shareholders for damages for breach of any duty owed to this Association or its shareholders, except for liability for any breach of duty based upon an act or omission (i) in breach of such person's duty of loyalty to this Association or its shareholders, (ii) not in good faith or involving a knowing violation of law or (iii) resulting in receipt by such person of an improper personal benefit.

(b) An officer shall not be personally liable to this Association or its shareholders for damages for breach of any duty owed to this Association or its shareholders, except for liability for any breach of duty based upon an act or omission (i) in breach of such person's duty of loyalty to this Association or it shareholders, (ii) not in good faith or involving a knowing violation of law or (iii) resulting in receipt by such person of an improper personal benefit.

(c) If the New Jersey statute permitting the provisions of this article is amended after approval by the shareholders of this Section 2 of Article Tenth to authorize corporate action further limiting the personal liability of directors or officers, the liability of a director or officer of this Association shall be limited to the fullest extent permitted by the New Jersey statute, as so amended from time to time.

(d) In the event the New Jersey statute permitting the provisions of this article is changed or expires with respect to either officers or directors,

such a change or expiration shall not affect or invalidate those provisions of this article which remain in accordance with law.

(3) This Association shall indemnify a corporate agent against his expenses and liabilities in connection with any proceeding involving the corporate agent by reason of his being or having been such corporate agent, other than a proceeding by or in the right of this Association, if

(a) such corporate agent acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of this Association; and

(b) with respect to any criminal proceeding, such corporate agent had no reasonable cause to believe his conduct was unlawful.

The termination of any proceeding by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent, shall not of itself create a presumption that such corporate agent did not meet the applicable standards of conduct set forth in this paragraph.

(4) This Association shall indemnify a corporate agent against his expenses in connection with any proceeding by or in the right of this Association to procure a judgment in its favor which involves the corporate agent by reason of his being or having been such corporate agent, if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of this Association. However, in such proceeding no indemnification shall be provided in respect of any claim, issue or matter as to which such corporate agent shall have been adjudged to be liable to this Association, unless and only to the extent that the Superior Court of New Jersey or the court in which such proceeding was brought shall determine upon application that despite the adjudication of liability, but in view of all circumstances of the case, such corporate agent is fairly and reasonably entitled to indemnity for such expenses as the Superior Court of New Jersey or such other court shall deem proper.

(5) This Association shall indemnify a corporate agent against expenses to the extent that such corporate agent has been successful, on the merits or otherwise, in any proceeding referred to in paragraphs (3) and (4), or in defense of any claim, issue or matter therein.

(6) Any indemnification under paragraph (3), and, unless ordered by a court, under paragraph (4), may be made by this Association only as authorized in a specific case upon a determination that indemnification is proper in the circumstances because the corporate agent met the applicable standard of conduct set forth in paragraph (3) or paragraph (4). Such determination shall be made

(a) by the board of directors or a committee thereof acting by a majority vote of a quorum consisting of directors who were not parties to the proceeding; or

(b) if such a quorum is not obtainable, or, even if obtainable and a quorum of the board of directors or committee by a majority vote of the disinterested directors so directs, by independent legal counsel in a written opinion; or

(c) by the shareholders.

(7) Expenses incurred by a corporate agent in connection with a proceeding may be paid by this Association in advance of the final disposition of the proceeding as authorized by the board of directors upon receipt of an undertaking by or on behalf of the corporate agent to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified as provided in this Article.

(8) The indemnification and the advancement of expenses provided by or granted pursuant to this Article shall not exclude any other rights to which a corporate agent may be entitled under an Article of Association, by-law, agreement, vote of shareholders or disinterested directors, or otherwise; provided that no indemnification shall be made to or on behalf of a corporate agent if a judgment or other final adjudication adverse to the corporate agent establishes that his acts or omissions (a) were in breach of his duty of loyalty to the corporation or its shareholders, (b) were not in good faith or involved a knowing violation of law or (c) resulted in receipt by the corporate agent of an improper personal benefit.

(9) This Association shall provide indemnification to its corporate agents to the fullest extent permitted by New Jersey law, it being the policy of this Association to safeguard its corporate agents from expense and liability for actions they take in good faith in furtherance of the interest of this Association and its shareholders.

(10) This Association may purchase and maintain insurance on behalf of any corporate agent against any expenses incurred in any proceeding and any liabilities asserted against him in his capacity as corporate agent, whether or not this Association would have the power to indemnify him against such expenses and liability under the provisions of this Article, except that such insurance excludes coverage when a formal order is issued assessing civil money penalties against a corporate agent.

ELEVENTH. These Articles of Association may be amended at any regular or special meeting of the shareholders by the affirmative vote of the holders of a majority of the stock of this Association, unless the vote of the holders of a greater amount of stock is required by law, and in that case by the vote of the holders of such greater amount.